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8. Jur.

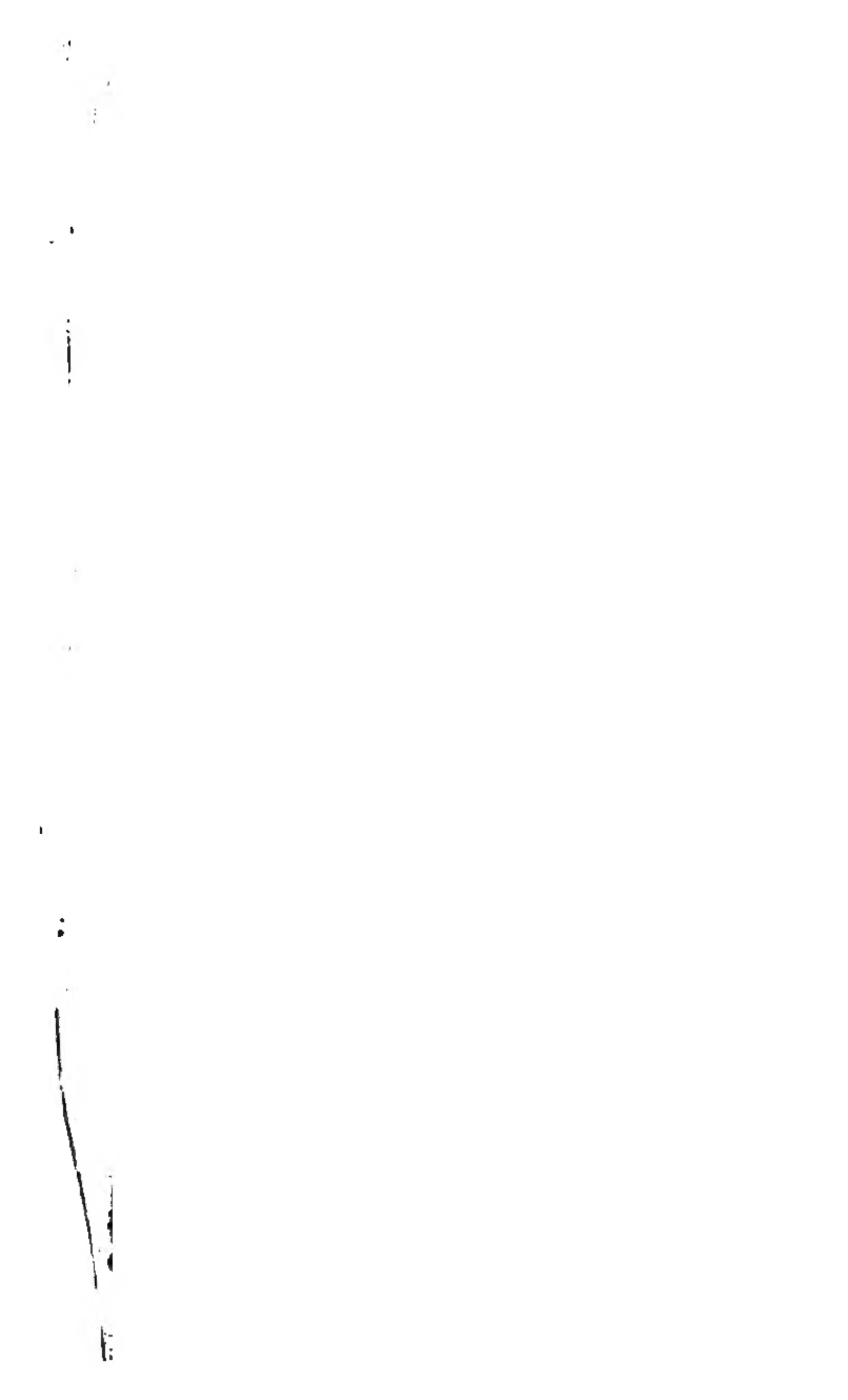
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8^o Jur. A. 14. 76.

A

TREATISE

ON

CRIMINAL PLEADING,

&c. &c.

Shortly will be Published

**A TREATISE on the LAW of EVIDENCE and DIGEST of
PROOFS in CIVIL and CRIMINAL PROCEEDINGS.**

By THOMAS STARKIE, Esq, Barrister at Law,

A
TREATISE
ON
CRIMINAL PLEADING,
WITH
PRECEDENTS OF INDICTMENTS,
SPECIAL PLEAS, &c.
ADAPTED TO PRACTICE.

VOL. I.

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BY THOMAS STARKIE, ESQ.

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TABLE OF CONTENTS.

TO

VOL. I.

	Page.
<i>Introduction</i>	xi

CHAPTER I.

How far the Indictment should shew the Offence to be within the Jurisdiction of the Indictors,

1. <i>Of the Locality of Crimes at Common Law.</i>	1
2. <i>Statutable Exceptions, and general Rules as to Indictments found upon them</i>	6
3. <i>In what County the Indictment should be laid in particular Cases at Common Law</i>	20
4. <i>Of noticing the Jurisdiction, when it depends upon some other particular circumstances</i>	27

CHAPTER II.

Of the Joinder of Parties and Offences,

1. <i>Joinder of Defendants</i>	31
2. <i>Of Offences</i>	38
3. <i>Of Defendants and Offences</i>	42

CHAPTER III.

Of the Description of the Defendant,

	Page.
1. <i>At Common Law.</i>	45
2. <i>Under the Statute of Additions</i>	47

CHAPTER IV.

Of the general Averments of Time and Place,

1. <i>Averment of Time</i>	54
2. <i>Averment of Place</i>	62

CHAPTER V.

<i>Of the substantial Description of the Offence in the Body of the Indictment</i>	68
--	----

CHAPTER VI.

*Of alleging the Nature and Degree of the Offence
in technical Terms,*

1. <i>As against the Principal in the first Degree</i>	74
2. <i>Against Principals in the second degree</i>	81

CHAPTER VII.

<i>Of setting forth the Means and Manner of committing the Offence, with the Circum- stances immediately connected therewith</i>	89
--	----

1. <i>Forcible Means, &c.</i>	89
2. <i>Fraudulent Means, &c.</i>	94

TABLE OF CONTENTS.

vii

	Page.
3. <i>Illegal Solicitations, Attempts, and Endeavours</i>	123
4. <i>Misconduct in Office, Extortions, &c.</i>	149
5. <i>Illegal Combinations and Conspiracies</i>	154

CHAPTER VIII.

<i>Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal</i>	160
1. <i>Situation or Character of the Defendant</i>	161
2. <i>Situation of others</i>	167
3. <i>Other Circumstances collateral to the principal Act, negative Averments, &c.</i>	171

CHAPTER IX.

<i>Of averring the Defendant's Intention</i>	177
--	-----

CHAPTER X.

<i>Of the Description of Persons, Places, and Things, connected with the Offence, with Names, Quantity, and Value</i>	182
1. <i>Certainty of Persons</i>	182
2. <i>Of Places</i>	182
3. <i>Of Things moveable</i>	192

CHAPTER XI.

<i>Conclusion of the Indictment</i>	208
-------------------------------------	-----

CHAPTER XII.

<i>Indictment founded upon Statutes</i>	212
1. <i>Recital of the Statute, and Effect of a Variance</i>	213
2. <i>Description of the Offence—1st, in Reference to the Circumstances mentioned in the Purview, and 2ndly, in Reference to the Language of the Statute</i>	219
3. <i>Conclusion against the Form of the Statute</i>	228

CHAPTER XIII.

<i>Caption of Indictment</i>	233
------------------------------	-----

CHAPTER XIV.

Defective Indictment,

1. <i>Language of Indictments</i>	242
2. <i>Indirect, uncertain, double, and indefinite Allegations</i>	244
3. <i>Repugnancy—Doctrine of Surplusage—Use of a Videlicit</i>	247
4. <i>Variance</i>	255

CHAPTER XV.

<i>Of Amendments</i>	259
----------------------	-----

CHAPTER XVI.

Of Process upon Indictments and Informations,

1. <i>In Case of Treason or Felony</i>	272
--	-----

TABLE OF CONTENTS.

ix
Page.

1. <i>Of the Capias, and in what Cases more than one is requisite</i>	273
2. <i>Of the Exigent and Outlawry</i>	282
3. <i>Writ of Proclamations</i>	285
2. <i>In Case of Misdemeanors below the Degree of Felony</i>	287
3. <i>In Case of Informations</i>	293
4. <i>Defects in Process</i>	294

CHAPTER XVII.

Motion to quash the Indictment,

1. <i>At the Instance of the Prosecutor</i>	300
2. <i>Of the Defendant</i>	301

CHAPTER XVIII.

Arraignment	305
-----------------------	-----

CHAPTER XIX.

Plea,

1. <i>To the Jurisdiction</i>	310
2. <i>Declinatory Pleas</i>	311
3. <i>Plea in Abatement</i>	311
1. <i>Defects apparent on the Record</i>	311
2. <i>Such as arise from Facts dehors the Record</i>	312
4. <i>Demurrer</i>	315
5. <i>Plea in Bar,</i>	316
<i>Auter-foits acquit</i>	316
<i>Auter-foits convict</i>	329
<i>Auter-foits attain</i>	331
<i>Pardon</i>	333
<i>To indictment for Misdemeanor</i>	335
6. <i>Not guilty</i>	338

CHAPTER XX.

	Page.
<i>Of the Verdict</i>	341
1. <i>General Verdict</i>	342
2. <i>Partial Acquittal</i>	346
3. <i>Special Verdict finding the Facts</i>	351

CHAPTER XXI.

<i>Of Judgment</i>	359
--------------------	-----

CHAPTER XXII.

Of avoiding the Judgment, Writ of Error, &c.

1. <i>By Plea</i>	367
2. <i>By Writ of Error</i>	371

INTRODUCTION.

THE legal definition of an offence being proposed, as well as the circumstances of a particular case falling within that definition, how is the charge to be described against the offender on the face of the record? With what certainty of legal terms and language? With what enumeration and detail of circumstances? To answer this important question with as much brevity as consists with clearness, and with reference to the authorities, is the principal object of this treatise.

I propose, therefore, in the first place, briefly to enumerate the different modes of criminal accusation recognized by the courts, and shall then proceed to consider their several requisites with some minuteness, and also to notice such other parts of the record as are connected with the main design.

1. A written accusation presented to the grand jury, (sworn to inquire for the body of the county,) at the suit of the king, is termed a bill of indict-

ment, and when found by them, on oath, to be true, is called an *indictment* (a).

A grand jury may find a bill to be true as to one or more charges contained in distinct counts, and find that it is not a true bill, or return it "not found," as to the rest (b); but they cannot divide an entire count, so as to find it true as to part only; and if they do, the whole of the finding is void, and a new bill should be presented (c). A bill cannot be found, unless twelve at the least of the grand jury agree to find it; for no man can be convicted, at the suit of the king, of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours, that is by twelve at the least of the grand jury in the first place, and afterwards by the whole of the petit jury, twelve more, finding him guilty upon the trial.

The indictment having been so found is publicly delivered in court.

An *indictment*, in a larger sense, is frequently used to denote an accusation or declaration, at the suit of the king, for some offence found by a proper jury of twelve men, at the suit of the king (d); and, in this sense, a presentment by a grand jury, when reduced to proper form, is termed an indictment, though no bill has been preferred (e).

(a) 2 Hale, 153. 2 Haw.
c. 25, s. 1.

(b) Cowp. 325.

(c) 2 Haw. c. 25. s. 2. Yel.
99.

(d) Co. Litt. 126. b.

(e) 2 Inn. 739.

2. A *presentment* is the notice taken by the grand jury of any offence, from their own knowledge (*f*) and observation, without any indictment laid before them at the suit of the king. Upon such presentment, the officer of the court must frame an indictment before the party can be put to answer it (*g*); in a larger sense, a presentment comprehends all inquisitions of office and indictments found by a grand jury (*h*), and all such as are made by magistrates by virtue of a statute (*i*).

3. When the accusation is found by a jury specially returned to inquire concerning that particular offence, it is termed an *inquisition*; as where a person is found guilty of the death of another upon an inquisition before the coroner on his view (*k*).

4. A defendant may be arraigned upon a *verdict*; as where, in an action of trespass, the jury find that the defendant stole the goods, or in an action for words imputing felony, where the defendant justifies that the words are true, and the jury find their verdict for the defendant. In such cases it is said, the party is liable to be put to answer, as on an indictment, without any further accusation, the charge having been found by a jury of twelve men. But, according to Serj. Hawkins, unless the court,

(*f*) Lamb. 1. 4. c. 5. 4 Bl. Comm. 301.

(*g*) 2 Ins. 793.

(*h*) 2 Haw. c. 25. s. 1.

(*i*) See the st. 13 G. 3. c. 78, as to presentments of highways, &c. see 2 Saund. 157.

(*k*) 2 Haw. c. 25, s. 6.

in which such a verdict is returned, has jurisdiction over the crime itself, such a verdict seems to be of little force (*l*).

5. An appeal was an accusation, by one private subject against another, of some crime (*m*); and in some instances, where the private appellant did not or could not proceed, the defendant might have been arraigned upon the appeal at the suit of the king (*n*). By the st. 59 G. 3. c. 46. these are wholly abolished.

6. An *information* is a declaration of an offence or charge against any one at the suit of the king (*o*); these are of three kinds:

1st. Those which are prosecuted at the suit of the king, and which are filed by his own immediate officer the attorney-general; and, 2dly, those which are prosecuted in the name of the king at the relation of some private person, or common informer, and these are filed by the king's coroner and attorney in the court of King's Bench. 3dly, Such as are in the nature of penal actions brought to recover penalties (*p*).

Various as these modes of accusation are in their origin, in their requisites, whether formal or substantial, they closely resemble each other (*q*); in

(*l*) 2 Haw. c. 25. s. 6. *R. v. Jolliffe*, 4 T. R. 493.

(*m*) 1 Ins. 123, 287. Staundf. 58.

(*n*) For the learning on this

subject, see 2 Haw. c. 25. s. 7, 8, &c.

(*o*) *Termes de la Ley*.

(*p*) *Vide p.*

(*q*) 2 Haw. c. 25. s. 9.

appeals, indeed, greater nicety was frequently exacted than in the proceeding by indictment; but the former, as has already been observed, are now abolished. In describing the different requisites of an indictment, presentment, inquisition, or information, in order to avoid repetition, the term indictment only will be used, the same rules being in general applicable to all.

The form and requisites of an indictment, and the process, pleas, &c. will be considered in the following order :

1. The formal requisites of an indictment, including the county (*r*) in which the offence is to be laid—the joinder of parties (*s*)—of offences—the description of the defendant (*t*)—the general averments of time and place (*u*).

2. The substantial description of the offence itself (*x*) in the body of the indictment.

3. The conclusion of the indictment (*y*).

4. Indictments upon statutes (*z*)

5. The caption of an indictment (*a*).

6. The several kinds of defects in indictments (*b*), and the doctrine of amendment (*c*).

7. Process (*d*), motion to quash (*e*), arraign-

(*r*) Chap. 1.

(*s*) Chap. 2.

(*t*) Chap. 3.

(*u*) Chap. 4.

(*x*) Chap. 5. to 10. inclusive.

(*y*) Chap. 11.

(*z*) Chap. 12.

(*a*) Chap. 13.

(*b*) Chap. 14.

(*c*) Chap. 15.

(*d*) Chap. 16.

(*e*) Chap. 17.

ment (*f*), pleas (*g*), verdict (*h*), judgment (*i*), writs of error (*k*).

To these is added a collection of Precedents, illustrated with a few notes. I have examined these forms with attention, and have intimated such doubts concerning them as they occurred.

(*f*) Chap. 18.

(*g*) Chap. 19.

(*h*) Chap. 20.

(*i*) Chap. 21.

(*k*) Chap. 22.

INDICTMENT.

CHAP. I.

How far the Indictment should shew the Offence to be within the Jurisdiction of the Indictors.

- I. *Of the Locality of Crimes at Common Law, p. 1. to 5.*
- II. *Statutable Exceptions, and general Rules as to Indictments founded upon them, p. 5 to 19.*
- III. *In what County the Indictment should be laid in particular Cases at Common Law, p. 19 to 26.*
- IV. *Of noticing the Jurisdiction, when it depends upon some other particular Circumstances, p. 26.*

THE power of jurors and others to inquire concerning offences, is usually circumscribed (*a*) and local; it is therefore essential to the validity of an indictment, to shew that the offence (*b*) was committed within the jurisdiction of those by whom the inquiry is made. And as an indictment will be defective which does not shew this, *a fortiori* it will be vicious, if it allege that the offence was committed in some place beyond the jurisdiction of the indictors.

By the simple rule of common law, the attention of jurors was confined with great strictness to the county or division for which they were returned;—a rule productive of so much inconvenience, that it was found necessary to introduce those statutable exceptions to it which will presently be noticed.

(*a*) 3 Ins. 49. Summ. 203. Eliz. 237. Dyer, 69, 2 Keb.
(*b*) 1 Buls, 203. 205. Cro. 302. Cro. J. 276. Keilw, 89.

Lord Hale says, "The grand (c) jury are sworn to inquire *pro corpore comitatús*, and therefore cannot regularly inquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament, except in some particular cases." Too strict an adherence to this doctrine produced an enormous failure of justice: it frequently happened that an offence begun in one county was consummated in another; the consequence was, that the offender escaped with impunity, since he could not be indicted by a jury of either.

In *Danby's* (d) case, under the statute 8 H. 6. c. 12. against stealing records, &c. it was held, that if the offence were to be committed partly in one county and partly in another, the offender could not be punished in either. But Lord Hale says, he might in such case be punished for the misprision of the felony in either county (e).

So under the (f) stat. 3 H. 7. c. 2., against the forcible abduction of an heiress, and afterwards marrying her, &c. it was held, that if the forcible abduction were confined to one county, and the marriage took place in a second, the offender could not be tried in either.

But if, in such case, the forcible abduction had been continued into the county where the marriage took place, the offence would have been complete in that county, and the offender might have been tried there (g)

(c) Hale, 163. *Bell's* case, ciny in B. at common law, 9 Car. B. R. though not of the robbery;

(d) Hale, 651, 2. for it is theft wherever he carries the goods. 7 Co. *Bul-*

(e) *Ib.*

(f) *Fulwood's* case, Cro. Car. *wer's* case, 2 Hale, 163. Br. 488. Hob. 183. Ind. pl. 26. Br. Cor. pl. 171.

(g) So if a man commit a robbery in the county A., and carry the goods into the county B., he is indictable of the larciny in any one county ought to serve him for plea in any other. Br. Cor. 140. 4 H. 7. 5.

In these instances the several acts, constituting the offence, were personally committed by the offenders in different counties: but the mischief resulting from the general rule was far more extensive; for it seems to have been held, that no collateral circumstance could be inquired of, if it happened in a second county, though the facts in which the offender was personally concerned, were confined wholly to the first; so that (*h*) if A. inflicted a mortal wound on B. in one county, of which B. died in the adjoining one, A. could be indicted in neither; for a jury of the first could not take notice of the death in the second, and a jury of the second could not inquire of the wounding in the first (*i*).

But it has been held, that if the common law does not take cognisance of the original taking, the offence cannot be inquired of at common law, though the goods be afterwards carried by the offender into a county. 3 Ins. 113. 13 Co. 53. And to remedy this supposed defect, an act was passed to authorize such trials in certain cases. Vide *infra*, p. 10. and the stat. 44 G. 3. c. 92, s. 7. Where goods stolen in Scotland or at sea, are brought into the body of a county, the case seems to embrace every ingredient of larciny at common law; the property in the goods remains unaltered, and there is a caption and asportation, *animo furandi*, within the county.

(*h*) See *pr.* to stat. 2 and 3

E. 6. c. 24. Staun. 89. 2 Hale, 163. 6 H. 7. 10. 10 H. 7. 28. 10 H. 7. 20. Fitz. Ind. 23.

(*i*) Though it appears from the preamble to the st. 2 and 3 E. 6. c. 24., that such was the law at that time with respect to indictments of homicide, yet it was otherwise with respect to appeals of death, which, when the blow was struck in one county and the party died in another, used to be tried by a jury from both counties. 4 H. 7. 18. Br. Cor. pl. 141. 1 Haw. c. 31. s. 13. 2 Haw. c. 23. s. 35. 2 Ins. 49. But when the counties could not join, the appeal failed. 2 Ins. 49.

But it was held, that an indictment must be taken in one county only. 4 H. 7. 18. And the difficulty was fre-

And the same nicety applied to the case of all accessories in one county to a felony committed in another, who, on account of the same difficulty, escaped unpunished (*k*).

quently avoided by carrying the dead body back into the county where the blow was struck, and there a jury might inquire both of the stroke and of the death. 6 H. 7. f. 10. 1 Haw. c. 31. s. 13. 7 H. 7. f. 8. And even without such removal it seems to have been doubted, whether a jury of the county, where the stroke was given, might not inquire of the felony. See 7 H. 7. 8. where Tremaille and Hussey, justices, were of opinion, that an indictment, which laid the blow in Middlesex, and the death in Essex, was good, because the striking is the principal act, and they who can take notice of the principal, may take notice of the debt, as an accessory, though in another county; but Fairfax, J. differed from them, and Sir Robert Brooke, in his abridgment of this case, agrees with Fairfax. Br. Ind. 31; and see 2 Haw. c. 25. s. 36.

And at common law the coroner, *super visum corporis*, might inquire of all accessories or procurers before the fact, though the procurement were in another county. 1 Hal. 427. 43 E. 3. f. 17.

(*k*) Staunf. b. 1. c. 46. 2 and 3 E. 6. c. 24. 1 Hale, 623. A man was indicted in Middlesex, for that he in the county of Middlesex procured J. S. to kill T. B.; by means of which, the said J. S. did kill T. B. in the county of Berks; and the defendant appears to have been discharged, not because such an indictment would not lie, but because the justices and coroner of the county of Berks certified, that the principal had not been indicted before them of the said felony. 9 E. 4. 48. Staunford, b. 1. c. 46. lays it down generally, that if A., committing a felony in one county, be received before attainder by B. in another, it is not felony in B., because those of the county where he offended, cannot notice the felony in the other county: and he cites the above case, 9 E. 4. 48. which does not warrant his position, and also 43 E. 3. f. 17., which was an appeal by a widow against two in the county of Kent, for receiving a third in the county of Dorset, who had killed her husband in Kent; and assuming those defendants to have been discharged, which,

The failure of justice, which resulted from this doctrine, is fully declared in the preamble to the st. 2 and 3 E. 6. c. 24., which provided a remedy for these defects against principals in case of homicide, and also against accessories to felonies in general.

The preamble recites, that “whereas it often happeneth and cometh in ure in sundry counties of this realm, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties; for that, by the custom of this realm, the jurors of the county where such party died of such stroke, can take no knowledge of such stroke, being in a foreign county, although the same two counties and places adjoin very near together. Ne the jurors of the county, where the stroke was given, cannot take knowledge of the death in another county, although such death most apparently came of the same stroke. So that the king’s majesty within his owne realm cannot, (l) by any laws yet made or known, punish such murtherers or manquellers for offences in this form committed and done; nor any appeal (m) at some time may lie for the same, but doth also fail, and the said murtherers and manquellers escape thereof without punishment, as well in cases where the counties where such offences be committed and done may join, as otherwise where they may not

from the whole of the case, f. 17. and f. 34. appears doubtful, it seems to be clear, that they were not discharged generally, on the ground that an appeal for receiving in one county the principal after the felony in a second, was not maintainable; for it was expressly held, that

where the principal felony and the receipt took place, in the *same vill*, though in *different counties*, an appeal lay. And it seems that the coroner might notice accessories in another county. See p. 4. note, (i).

(l) But see p. 12.

(m) See p. 3. note (i).

join. And also it is a common practice amongst errant thieves and robbers in this realm, that after they have robbed or stolen in one county, they will convey their spoil, or part thereof, so robbed or stolen, unto some of their adherents into some other county, where the principal offence was not committed or done, who, knowing of such felony, willingly and by false covin receiveth the same (n); in which case, although the principal felon be attainted in one county, the accessory escapeth by reason that he was accessory in another county, and that the jurors of the said other county, by any law yet made, can take no knowledge of the principal felony ne attainder in the first county, and so such accessories escape thereof unpunished, and do often put in ure the same, knowing that they may escape without punishment."

The statute then proceeds to enact,

1st. That where a person feloniously stricken or poisoned in one county, shall die of the same in another, an indictment thereof, found by jurors of the county where the *death shall happen*, whether before the coroner, upon sight of the body, or before the justices of the peace, or other justices or commissioners having authority to inquire, shall be as good and effectual as if the stroke or poisoning had been committed in that county.

2. That the justices of goal delivery and oyer and terminer (o), in the county where such indictment shall be taken, and the justices of the King's Bench, after such indictment removed before them, shall proceed thereon, in all points, as if such felonious stroke, or poisoning and death, had grown in the same county.

(n) Hence it should seem, holden, both before and after that the receiver of stolen goods, the statute. See Fitz. Cor. 126. knowing them to have been 208. Staunf. b. 1. f. 44. and stolen, was then considered 5 Ann. c. 31. to be an accessory; yet certainly the contrary has been

(o) The court of K. B. is within these words. 9 Co. 118.

3. That in such case *an appeal* may be sued in the county where the party died, both against principals and accessories, in whatsoever county the accessories shall be guilty; and that the justices shall proceed against such accessories, in the county where such appeal shall be so taken, in like manner and form as if their offences had been committed and done in the same county (*p*), as well concerning the trial by jurors upon plea of not guilty as otherwise.

4. That where any murder or *felony* shall be committed in one (*q*) county, and one person or more shall be *accessory or accessories*, in any manner of wise to any such murder or felony, in any other county, then an indictment found or taken before such justices of the peace, &c. to inquire of felonies in the county (*r*) where such offence of accessory or accessories, shall be committed or done, shall be as good and effectual as if the principal offence had been committed or done within the same county, where the same indictment against such accessory shall be found.

The statute then proceeds to direct, that upon suit to the justices &c. or two of them, in such county where such offence of accessory shall be committed, they shall

(*p*) And therefore in case of an appeal, it is not necessary to procure a jury from both counties. Vide supra, p. 3. n. 1. in the third county good as against the principal, but not as against accessories. But see the stat. 43 G. 3. c. 113. s. 5.

(*q*) A. in one county directs B. to murder C., B. strikes C. in a second county, and C. dies in a third,—qu. whether A. is within the act? for the offence of murder is not complete in any one county, and the former part of the statute makes the inquiry (r) It is remarkable that the same statute should direct, that accessories to a murder, if prosecuted by appeal, should be tried in the county where the party died, but if by indictment, in the county where they were accessories.

write (s) to the *custos rotulorum*, or keepers of the records, to certify whether the principal is attainted, convicted, or otherwise discharged; and after the receipt of such certificate, shall proceed against every such accessory in such county where he became accessory, and in such manner and form as if both the principal offence and that of the accessory had been committed in that county.

In an indictment against an accessory under this statute, for procuring the commission of a murder in another county, it should be averred according to the fact, that the principal committed the murder in the true county (t). And upon the same ground the blow should be averred to have been struck in the first county, though the party be indicted in the second, where the death happened.

And now by the stat. 43 G. 3. c. 113. s. 5. accessories before the fact to felonies may be tried either in the county where the principal offence was committed, or in that where the offence of becoming accessory was committed.

As an offence, begun in one county and completed in another, could not be tried in either, *a fortiori* the objection applied where part of the offence was committed out of the realm. So that if a blow were given on the high seas, of which the party died in England, this was held to be *casus omissus*, which could be tried neither by the admiral, nor by a jury of the county (u). But by the stat.

(s) The writing should be by writ in the king's name, under the teste of the justice so sending it. Dy. 254. b. 1. Hale, 623. The same form of proceeding appears to have been adopted before this statute was made. See f. 4. note k.

(t) Lord Sanchar's case, 9

Co. 114. 2 Haw. c. 29. s. 51. 3 Ins. 49.

(u) 3 Ins. 48. 2 Hale, 163. But it seems the death formerly might have been inquired of by the court of K. B., sitting in the county where it happened. 2 Hale, 12. 15.; so it may under 33 H. 8. c. 23. See p. 12.

2 G. 2. c. 21., where any person, feloniously stricken or poisoned at any place out of England, shall die of the same in England, or being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment thereof, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessories, as if the offence had been completed in the county where such indictment shall be found.

A person on shore shot at and killed another upon the sea, at the distance of 100 yards from the shore: and it was holden that the case was not within this statute, but that the felony was triable by the admiral (x).

In general where a statute makes a new felony of an offence, consisting partly of an act within the kingdom and partly of one without, and limits it to be tried *where the offence is committed*, it shall be tried where that part of the offence is committed that is within the kingdom. So that an offender against stat. 1 J. c. 2., by passing the sea and serving a foreign prince, without taking the oath of obedience, was held to be triable in that county whence he passed upon the sea (y).

Before those statutes are noticed, which authorize an inquiry in a county wholly unconnected with the offence, it may be proper to notice others, which give the courts cognizance of an offender who brings goods into a county feloniously stolen elsewhere.

By the stat. 3 W. & M. c. 9. s. 3., if any person or persons be indicted of felony for stealing any goods in any county of England, Wales, or town of Berwick-upon-Tweed, and be convicted or attainted, or stand mute, or will not directly answer, &c. or challenge peremptorily above 20, &c. he or they shall be excluded from the be-

(x) *Coombe's case*, Leach, 432. (y) 1 Hale, 706. 3 Ins. 80.

nefit of clergy, if it appear, upon evidence before the justices, that the said goods, &c. were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person or persons had been convicted by a jury of the said other county, he or they are excluded from clergy (z).

But neither this act, nor the stat. 25 H. 8. c. 3., extends to larcinies ousted of clergy by subsequent statutes (a), or to appeals or accessories. Under the latter statute, it is not necessary that the indictment should aver, that the offence in the foreign county was not clergyable; but it is usual to make an entry to that effect, and to write in the margin of the indictment that it is for a burglary or robbery in another county (b). The objection is made by means of a counterplea to the prisoner's prayer of clergy, by which means the circumstances in which the aggravation consists are made to appear upon the record (c). The value of the goods should appear to be more than 12d.; for otherwise it would be unnecessary for the prisoner to pray his clergy and therefore the exclusion from it could not hurt him (d).

Next, the stat. 44 G. 3. c. 92. s. 7. after reciting that doubts had been entertained upon the subject, enacts, that if any person, having stolen or otherwise feloniously taken away money, cattle, goods, or other effects, in one of the parts of the united kingdom, shall afterwards have the same or any part thereof in his possession or custody, in any other part of the united kingdom, it shall be lawful to

(z) See also 25 H. 8. c. 3. & 5 & 6 E. 6. c. 10.

(b) 1 Hale, 518. 2 Haw. c. 33. s. 82. And. 114.

(a) East. P. C. 775. 1 Hale, 519. 11 Co. 31. And qu. whether to cases where a thief is taken with the goods within a liberty or corporation.

(c) Per Eyre, C. J. East's P. C. 777. Qu. whether it is discretionary in the court to direct the inquiry.

(d) East, P. C. 775. 1 Hale, 536. 2 Hale, 349, 351.

indict, try, and punish such person for theft or larciny, in that part of the united kingdom where he shall have the same in his possession, as if the same had been originally stolen in that part of the united kingdom. And by the same statute, s. 8. receivers of such stolen goods, &c. may be tried in the part of the united kingdom where they received the same (e).

Those statutes will in the next place be briefly mentioned, which authorize an inquiry in a county wholly unconnected with the offence.

1. In the county where the offender was *apprehended*.
2. In a *county adjacent* to that in which the offence was committed.

3. In *any county* generally.

And next some statutes will be noticed, which particularly relate to offences,

4. Committed in *Wales*.

5. *On the high seas*.

6. *Beyond the realm*.

1. By the st. 1. J. 1. c. 11. s. 1. (f). “An offender shall receive such and the like proceeding, trial, and execution, in such county, where he shall be apprehended, as if the offence had been committed in the same county where such person shall be taken or apprehended.”

This clause has been construed to mean the county where the party is imprisoned (g).

(e) See also the st. 13 G. 3. c. 31. s. 4. averment to that effect, see East's P. C. 469. 11 St. Tr. 200. Cro. Car. 461. But qu.

(f) Against bigamy.

whether this be essential if it

(g) Hutton, 131. Lord Digby's case, East's P. C. 468. If the prisoner be tried in the county where he has been apprehended, the indictment, regularly, ought to contain an appear from the whole record that he was imprisoned there. See Lord Digby's case, Hutt. 130. Berwick's case, Fost. 10.

By st. 53 G. 3. c. 308. all criminal offences against any acts for granting or securing duties under the management of commissioners of stamps, may be tried, inquired of, and determined, either in the county or city, or town and county, where the offence shall be committed, or where the party or parties accused, or any of them, shall be apprehended.

And under the former of these statutes the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed (*h*).

In general, where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed (*i*).

2. In a *county adjacent* to that in which the offence was committed. By the stat. 26 G. 2. c. 19. against plundering ships when wrecked, the felony may be tried in the next adjacent county.

Felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of Parliament, may by stat. 8. G. 2. c. 20. and 13 G. 3. c. 84. be inquired of and tried in any adjacent county.

3. In *any county* generally.

By stat. 33 H. 8. c. 23. persons examined before the king's privy council, or three of them, and by the said privy council *vehemently* suspected of any treason, misprisions of treason, or murder, committed in any place within the king's dominions or without, may be inquired of, heard, and determined, in whatever county or place the king shall think fit, by virtue of a commission of oyer and terminer, under the great seal; and, upon the trial, no challenge for the shire or hundred shall be allowed.

With respect to indictments, as well as trials for treason

(*h*) 1 Hale, 694.

(*i*) Hale, 694. 3 Ins. 87.

the better (*k*) opinion seems to be, that this statute was repealed by the stat. 1 & 2 P. & M. c. 10. s. 8. which enacts, that all trials thereafter had for any treason, shall be had and used only according to the course and order of the common laws of the realm, and not otherwise.

But with respect to murder, this statute remains in force (*l*). This act, which appears to have been rarely resorted to, did not extend to accessories (*m*); but it embraces murders committed beyond the realms in the most plain terms (*n*); and it has been extended to the case of accessories before the fact to murder, and to cases of manslaughter, by the 43 G. 3. c. 113. s. 6. The statute extends to the trial of offences committed in foreign countries which are no part of the king's dominions (*o*). The words of the statute are so large, that they seem to reach the case of murder, where the stroke and death occur in different counties; yet this is inconsistent with the declaration of the legislature in the preamble to the stat. 2 & 3 E. 6. c. 24.

The stat. 9 G. 1. c. 22. (commonly called the BLACK ACT,) enacts, (s. 14.) that for the more impartial trial of any indictment or information under that act, "every offence that shall be done or committed contrary thereto, shall

(*k*) 1 Hale, 283. 2 Hale, 164.
3 Inst. 27. contra. Staunf. b. 2.
f. 90.

(*l*) 1 Hale, 283. 374. 2 Hale,
22. 164. 3 Inst. 27. *Athos's*
case, 8 Mod. 144. *Antonio de*
Pardo's case, 1 Taunt. 26.
Chamber's case cited, 8 Mod.
144. *Ealing's* case, E. P. C.
369.

(*m*) *Lodowike Grevil's* case,
1 And. 195. East's P. C. 369.

(*n*) And so held in *Ealing's*
or *Ealy's* case, East, P. C. 369.
Roche's case, Leach. see note

(*l*). *R. v. Sawyer*, MSS.

(*o*) *R. v. Sawyer*, argued be-
fore the 12 judges, in the Ex-
chequer Chamber, Easter T.
55 G. 3. and see the cases of
Chambers and *Ealing*, cited in
Atho's case, 8 Mod. 144.

and may be inquired of, examined, tried, and determined, in *any county* in England, in such manner and form as if the offence had been there committed.

Under this clause it has been held, that it is at the option of the prosecutor to prefer his indictment in such county as may appear to him to be most conducive to the ends of justice; but that he cannot exercise this right for the purposes of injustice and oppression (*p*).

By stat. 9 G. 2. c. 35. s. 26. in case of any assault made upon any of the officers of the customs or excise, the offence may be inquired of in any county, as if it had been committed there. But this act was not intended, by the legislature, to extend beyond the protection of officers whilst in the execution of their duty, and therefore a count in an indictment against the defendant in a foreign county, charging him barely with an assault upon an excise officer, is bad in arrest of judgment (*q*).

By stat. 37 G. 3. c. 70. the treasonable offences therein named, whether committed in England or on the high seas, may be tried before any court of oyer and terminer or gaol delivery, for any county in England.

4. Committed in *Wales* (*r*).

(*p*) *R. v. Mortis, Leach*, 86.

(*q*) *R. v. Cartwright*, 4 T. R. 490.

(*r*) By stat. 20 G. 2. c. 42. s. 3. it is enacted and declared, that in all cases where the kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any act of parliament, the same shall be taken to comprehend and include the dominion of Wales and the town of Ber-

wick-upon-Tweed. Hence the stat. 2 G. 2. c. 20. which provides for cases where the death happens in England from a cause feloniously given out of England, or *vice versa*, does not apply to the case of a party dying in Wales in consequence of a blow inflicted in England. See 1 Hale, 158. 2 Roll. 28. For the same reason, Wales is not within stat. 35 H. 8. c. 2. for the trial of foreign treasons.

By stat. (s) 26 H. 8. c. 6. counterfeiting of coin, washing, clipping, or minishing of the same, felonies, murders, wilful burnings of houses, manslaughters, robberies, burglaries, rapes, and accessories of the same, or other offences, done in Wales (t) within any lordship marcher, may be inquired of, heard, and determined before the justices of gaol delivery, and of the peace, and every of them in the next adjacent English county, where the king's writ runneth, in like manner as if the same had been committed in the said county. And this act was confirmed by the stat. 34 & 35 H. 8. c. 26. which gives the justices of the grand sessions, power to hold all manner of pleas, and to hear and determine all treasons, felonies, &c. within their commissions, as fully as the court of King's Bench may do within the realm of England.

This statute (u) is not confined to the lordship's marchers,

(s) Before this stat. no treason, murder, or felony committed in Wales, was inquirable before justices or commissioners in England; but only before justices or commissioners assigned by the king, in those counties of Wales where the fact was committed. 1 Hale, 156.

(t) Supposing the stroke to be given in England, and the party to die in Wales, qu. whether the offender can be tried under this act, aided by 2 and 3 E. 6. c. 24. Mr. East, in his P. C. 365, inclines to think that the trial might be in England. But there appears to be this difficulty to contend with, viz.

this construction might draw the trial from the county in which the death took place, to that in which the blow was struck; the very reverse of which was intended by the framers of the 2 and 3 E. 6. If indeed that stat. had enacted, that the offence, to *all intents and purposes*, should be considered as committed in the county where the death took place, the point would have been more dubious; but it is only so considered for a limited purpose, viz. the trial of the offender in *that county where the party dies*.

(u) Str. 533. 8 Mod. 134. 4 Bl. Com. 303.

but the justices of assize have a concurrent jurisdiction, throughout all Wales, with the justices of grand sessions (x).

By 26 Geo. 2. c. 19. against plundering ships when wrecked, the felony, when committed in Wales, may be tried in the next English county.

Parry and Roberts were indicted under this act, in the county of Salop, for an offence committed in Anglesea; and it was objected that the trial ought to have been in Cheshire, as the next English county. But all the judges were of opinion that the trial was proper, and that Cheshire was not to be considered as an English county within either this act (y), or the 26 H. 8. c. 6.

'5. *On the high seas, (z).*

By stat. 28 H. 8. s. 15. treasons, felonies, robberies, murders, and confederacies, committed in or upon the seas (a), or in any haven, river, creek, or place, where the

(x) The statute does not extend to an appeal of murder, 1 Hale, 157. and with respect to trials for treasons, stands repealed by stat. 1 & 2 P. & M. c. 10.

(y) *Parry's case*, Leach, 125. 8 Mod. 136. Hal. 156. 1 Haw. c. 31. s. 14.

(z) The realm of England comprehends the narrow seas, and it was formerly the practice to punish both treason and felonies committed there, in the court of King's Bench, 1 Hale, 154. And such offences committed in those seas might be tried in the next county

adjacent to the coast, by an indictment taken by the jurors for that county, before special commissioners, *ib.*

(a) The admiral never had jurisdiction in any creek, river, or port within the body of a county, 1 Haw. c. 37. s. 16. 2 Hale, 15, 16. 4 Inst. 137.

And the statute does not extend to such places, *ib.* But the stat. 15 R. 2. c. 3. authorises the admiral to inquire of deaths and mayhems done in ships hovering in the main streams of great rivers, only beneath the bridges of the same rivers, nigh to the sea.

Admiral has, or *pretends to have* (a), jurisdiction, shall be tried according to the course of common law, and in such places and counties as shall be appointed by the king's commission (b), in like manner and form as if the same had been committed upon land.

This statute, with respect to treasons done at sea, is not repealed by 35 H. 8. c. 2 (c).

Upon this statute a doubt arose, whether one who was accessory, at law, to a felony committed at sea, was triable by the admiral within the purview (d) of it; but, by the stat. 11 and 12 W. 3. c. 7. (e) accessories to piracy

But this jurisdiction was concurrent with the common law. 2 Hale, 16. 54. The principal question arising upon the, stat. 28 H. 8. c. 15. is as to the limits of the admiral's jurisdiction; i. e. whether the offence was committed at sea or within the county; for in the latter case the admiral has no jurisdiction, 4 Ins. 137. except in cases within the stat. 15 R. 2. c. 3. which has just been cited. According to Lord Hale, that arm and branch of the sea which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. 2 Hale, 16. 54. 4. Ins. 141. 13 Co. 52. According to a more accurate definition, an arm of the sea is to

be considered as within the body of a county, where a man standing on one side can see what is done on the other; for there, according to Lord Coke, the county may well know the fact. 2 Haw. c. 9. s. 14. 13 Co. 52. 2 Rol. Ab. 169. 4 Ins. 140. 12 Co. 81.

(a) I. e. between the high water mark and the low water mark, where the admiral has jurisdiction or not as the tide is in or out. 3 Ins. 113.; if, therefore, a man stricken on the high sea die upon the shore upon the reflux of the tide, the case is not within the admiral's jurisdiction. 2 Hale, 17.

(b) 2 Hale, 16, 17.

(c) 3 Ins. 112.

(d) Yelverton, 134, 135.

(e) Made perpetual by 6 G. 1. c. 19.

may be inquired of according to the stat. 28 H. 8. c. 15. Also by the same stat. piracies and felonies upon the sea, &c. may be inquired of in any place at sea, or upon land in his majesty's dominions, appointed by the king's commission. Also by the stat. 4 G. 1. c. 11, 8 G. 1. c. 24. and 2 G. 2. c. 28. several piratical offences therein mentioned, and by stat. 18 G. 2. c. 30. certain acts of hostility committed at sea in time of war, may be inquired of and tried in the admiral's court (*f*). And by the stat. 43 G. 3. c. 113. s. 5. all accessories before the fact to felonies committed upon the high seas, whether the offence of becoming accessory shall have been committed within the body of a county of the realm, or upon the high seas, may be tried in the manner prescribed by the stat. 28 H. 8. c. 15.

The stat. 1 Ann, stat. 2. c. 9. s. 4. for preventing the destruction of ships by masters or mariners, directs that such offences committed on the high seas, &c. shall be inquired of, tried, &c. and adjudged in such shires and places of the realm, as shall be limited by the queen's commission under the great seal, in such manner and form as by stat. 28 H. 8. s. 15. is directed for the trial of pirates.

The st. 11 G. 1. c. 29. s. 7. against the wilfully destroying any ship or vessel, enacts, that if the offence be committed upon the high seas,, it shall be inquired of in such court and in such manner and form as by st. 28 H. 8. is directed and appointed for the inquiring, &c. of felonies done upon the high seas.

The stat. 33 G. 3. c. 67. against wilfully setting fire to any ship or vessel, directs that if any of the said offences shall be committed on the high seas, the offender may be tried at any admiralty session, &c. (*g*)

(*f*) And see 2 and 3 Ann,
c. 20. s. 35.

(*g*) And see 43 G. 3. c. 113.
37 G. 3. c. 70.

The st. 39 G. 3. c. 37. enacts, that all offences committed on the high seas, out of the body of any county, shall be offences of the same nature, and liable to the same punishments as if they had been committed on shore, and shall be inquired of, heard, tried, and adjudged, as offences under stat. 28 H. 8. c. 15.

6. *Beyond the realm.*

By stat. 35 H. 8. c. 2. it is enacted, that all treasons, (*h*) or misprisions of treason, committed beyond the realm, shall be determined before the justices of the King's Bench, by men of the county in which the court sit, or else before such commissioners and in such shire as the king shall appoint.

Under this statute it has been holden, that commissioners may be appointed by the king, by his writing his name to the commission which appointed them, or by his signing the warrant to the lord keeper for the commission; and that, if the court of King's Bench or commissioners, after having taken an indictment in one county, remove into another, the trial must be had before the jurors of the first county (*i*).

By the second section of this statute, privilege of peerage is saved.

This statute was not repealed by 1 & 2 P. & M. c. 10. which applies only to treasons committed within the realm.

Under this act it has been holden, 1st. That one who commits treason in Ireland might be tried in England, for

(*h*) Even at common law it was holden that treason, in adhering to the king's enemies beyond sea, was inquirable and triable where the defender had lands. Co. Litt. s. 440. p. 261. 3 Ins. 11. 2 Hale, 164. (*i*) 3 Ins. 11. 1 Summ. 16, 205.

it is no part of the realm of England (*k*). 2nd. That an Irish peer might be tried in England for treason committed in Ireland, though he thereby lost the benefit of a trial by his peers (*l*).

By stat. 2 & 3 Ann. c. 20. s. 35. certain treasons and felonies, committed by officers or soldiers out of England, may be inquired of in the Queen's Bench, or before commissioners in any county, appointed by the queen.

By stat. 7 Ann. c. 21. s. 5. Scotchmen are triable before commissioners in any shire, stewarty, or county of Great Britain, as shall be assigned by the crown, for all treasons and misprisions of treasons committed out of the realm of Great Britain.

By stat. 10 and 11 W. 3. c. 25. all robberies and other capital crimes committed in Newfoundland, may be inquired of and tried in any county in England.

By stat. 12 G. 3. c. 24. s. 2. offenders burning or destroying the king's ships, arsenals, magazines, dock-yards, &c. out of the realm, may be indicted and tried for the same either in any shire or county within the realm, or in the island, country, or place, where such offence shall have been actually committed.

Upon these acts it may be observed, 1. That all facts within the realm should be laid within the proper county (*m*). 2ndly, That an offence upon the high seas must be alleged to have been committed there, to shew the admiral's jurisdiction under the 28th of H. 8. and its dependent statutes (*n*). 3dly. That an offence committed

(*k*) *O'Rorke's case*, 1 Hale, Dyer, 362. contra; and see 155. Sir J. Parrot's case, the provision contained in 39 3 Ins. 11. *Calvin's case*, 7 Co. G. 3. c. 44. s. 7, 8. and East, R. 31. F. C. p. 104.

(*l*) Lord Macguire's case, (*m*) 3 Ins. 49. *Sanchar's case*, 7 St. Tr. 928. 1 Hale, 195. 9 Co. 114. 2 Haw. c. 29. s. 51.

in any other place beyond the realm should be laid to have been done *in partibus transmarinis* (o); and though it may be laid to have been committed within the county where the inquiry is made (p), yet it seems to be more correct to aver according to the fact.

In what county the indictment should be laid in particular cases at common law.

It has already been seen that, by the stat. 1 & 2 P. & M. c. 10. (q) treason, committed in England and Wales, is to be tried according to the *due course and order of common law*.

But the statutes relating to treasons committed on the high seas, or out of the realm, have not been repealed, for these acts deprived the subject of no defence to which he was before entitled; on the contrary, they introduced a trial founded in the wisdom and benignity of the common law, with all the advantages incident to it, except in point of locality, which the nature of the case did not admit of (r).

With respect to the description of overt acts of *treason* within the realm, it seems to be now fully established, that one (s) overt act must be laid and proved in the

(n) 3 Ins. 112. Coombe's case, Leach, 432. yer's case, 6 St. Tr. 260. Kelyng, C. J. p. 15. takes

(o) *Ealing's* or *Ely's* case, East, P. C. 343. *Athos's* case, 8 Mod. 141. this distinction, that where a levying war is laid as an overt act of compassing the king's

(p) Per Cur. 8 Mod. 141. death, though laid within the

(q) So far repealing 32 H. 8. c. 20. and 33 H. 3. c. 23. county, it may be proved elsewhere; but, that where the le-

(r) Fost. 238. vying war is laid as the substan-

(s) 1 & 2 P. & M. c. 10. s. 7. tive treason, it is local, and must Dy. 132. a. Lord Preston's case, 4 St. Tr. 447, 8. Sir H. be laid in the proper county;— *Vane's* case, Kel. 14, 15. La- may be good evidence to prove

county where the indictment is laid, and trial had according to the order and course of the common law, and that afterwards any overt acts of the same species of treason, committed elsewhere, may be given in evidence, though not alleged in the indictment.

Where a person, by means of an innocent agent, procures a *felony* to be done in another county, he is indictable there though not personally present. Girdwood was indicted (t) in the county of Middlesex for feloniously sending a threatening letter. It turned out in evidence, that the letter in question, directed to the prosecutor, had been delivered by the prisoner in *London*, to a person who put it into the post office in *London*, whence it was conveyed regularly to the prosecutor in *Middlesex*:—and the twelve judges were unanimously of opinion that the prisoner had been properly tried in *Middlesex* (u). And in the case of the *King v. Coombes* (x), before referred to, it was holden, that a person who, standing upon the shore, shot a man upon the high seas, was guilty on the high seas, since the offence is committed where the death happens, and not at the place whence the cause of the death proceeds. And on the same prin-

a compassing, &c. in Middlesex, and so tend to establish the treason there; but a levying war in Surrey does not prove a levying war in Middlesex. Where the levying war is laid as the treason, a levying war in another county may be evidence to shew the nature of the acts proved in the county where the treason is laid, as in the cases of *Damaree*, *Purchase*, and *Willes*, 8 St. Tr. 218.; and *Deacon's*

case, Fost. 8. In Kel. 15, the Chief J. asserts, that a levying war, if laid as the treason, must be proved within the county, and does not lay it down that no levying of war, beyond the county, can be proved in addition. But see East's P. C. 126.

(t) Under 27 G. 2. c. 15.

(u) Leach, 169.

(x) Leach, 432. *Essex's* case, East's P. C. 1. 125.

ciple, if a man standing in the county A. (*y*) were to shoot at and kill another in the county B. it would no doubt be holden that the offender was guilty in B. But it would be otherwise if A. in one county should procure B. a *guilty* agent to commit a murder in a second, for in that case A. would be an accessory before the fact, and triable in the first county by virtue of the stat. 2 & 3 E. 6. c. 24. So if A. in one (*z*) county deliver poison to D. to be administered to B. as a medicine in another county, and D. not knowing that it is poison, administer it to B. in the second county, and B. die of it; or if a person in one county (*a*) procure a child, without discretion, to burn a house in a second, it is clear that the procurers in these cases will be principals in the felonies, though not present, and therefore ought to be indicted where the poisoning or burning is effected, though it would be otherwise if their agents were guilty as principals, since in that case the procurers would be accessories before the fact.

And in cases like these, it appears clear that the agency of the defendant, in a foreign county, may be inquired into at common law, in the county where the principal act is done, and that the poisoning or burning may be alleged to have been committed by the principal in the county where the act was done by the innocent agent. And according to Kelyng, C. J. where the act is of a *transitory* (*b*) nature, it may be inquired of by a jury though done in a foreign nation, as where a man marries one wife in France and another in England.

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| (<i>y</i>) An unqualified person standing in one county, shoots at game in another, the offence, under 5 Ann. c. 14. is committed in the county where he stands, 2 Burn's, J. ed. 20. p. 427. | Show. 339. for there he uses the engine. |
| | (<i>z</i>) 1 Hale, 616. Fost. 349. |
| | (<i>a</i>) 1 Hale, 514, 617. Fost. 349. |
| | (<i>b</i>) Kel. 15. |

But where a transitory act does not happen within the county, it seems to be proper to lay the fact at some vill within the county, or after laying it at the true place, to add some vill within the county, under a videlicet, by way of venue. In Lady Russel's case, (c) the defendants were indicted for a forcible entry, and for the forcible expulsion of the prosecutrix from her office. The prosecutrix held the office under letters patent, by which it was granted to R. B. for life, with remainder to the prosecutrix after his death, &c. The indictment, in stating the title of the prosecutrix, alleged the death of R. B. at H. in another county, and upon exception taken, the court of K. B. inclined to the opinion that the indictment was for this cause defective, but no judgment was given. But at all events, if an act of a *transitory nature* be laid at some place within the county, it may be proved to have been done elsewhere, and this even in case of an indictment for treason (d).

If goods be stolen in one county and carried into another, the party is guilty of felony in the latter county; since the legal possession still remains in the true owner,

<p>(c) Cro. J. 17. There does not appear to be any good reason why an act of a transitory nature should not be alleged to have happened where it really did happen; the objection against laying a fact in a foreign county is in many instances a substantial one, founded upon the incapacity of a jury to make inquiry concerning facts <i>dehors</i> their jurisdiction, and where that objection applies, no form of pleading can obviate</p>	<p>it; but where the radical objection does not apply, i. e. where the matter is <i>transitory</i> and may be inquired of in another county, it is not easy to say why the truth should not appear upon the record. The fact is, that the old common law restraint upon the inquiries of juries, has been in later times much relaxed, though the same strictness in the form of pleading has been retained, (d) Kel. 15.</p>
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and every moment's continuance of the trespass and felony amounts to a new caption and asportation (e).

Where a clerk or servant has received his master's money in one county, for which he has refused to account to the master in another, it seems the (f) indictment should be laid in that county in which he refused to account.

The master residing in the county of Middlesex, the servant received the sum of 10s. for him in the county of S.; upon his return to his master, in the county of M., he was asked whether he had brought the money; he answered that he had not received it, and in fact never did account for it.

Upon being indicted in the county of Middlesex, it was objected for the prisoner, that he ought to have been indicted in Surrey, and the question was reserved for the consideration of the judges, who were of opinion, "that the indictment was well laid; for there was no evidence of any act to bring the prisoner within the statute, until he was called upon by his master to account; when called upon by his master to account, the prisoner denied that he had ever received it: this was the first act, from which the jury could say, that the prisoner intended to embezzle the money."

"There was no evidence of the prisoner's having done any act to embezzle in the county of Surrey, nor could

(e) 1 Hale, 507, 8. 2 Hale, 163. 2 Haw. c. 25. s. 38. East's P. C. 771. By the stat. 59 G. 3. c. 27. particular provisions are made for facilitating the trial of felonies committed on board of vessels employed on canals, rivers, and inland navigations. And by the stat. 59 G. 3. c. 96. provisions of a similar

nature are made with respect to felonies committed on stage-coaches, and other felonies committed on the boundaries of counties. See notes to the Precedents in Larciny and Appendix.

(f) Under the stat. 39 G. 3. c. 85.

the offence be complete, or the prisoner be guilty, within the act, until he had refused to account to his master" (g).

In the case of the *King v. Hobson* (h), the prisoner had received the money in the county of Salop, and denied the receipt of it to his master in the county of Stafford; and when he went into the county of Salop, he persisted in that denial.

The judges (the point having been reserved) were of opinion, that there was sufficient evidence of a beginning to embezzle in the county of Salop, to make the offence triable in that county: and most of them thought, that the subsequent conduct of the prisoner, his not accounting to his master, and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal within the meaning of the statute, and the more so as the act of secreting was a negative act; and some considered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon in the other.

The rule of common law restraining jurors from inquiring into facts arising in another county, does not appear to have been at any time so strictly observed in misdemeanors inferior to treason and felony as in capital cases; for, as already observed, a party committing acts constituting a felony in two separate counties, might have been indicted of the misprision in either, though the jury, in trying the latter offence, must necessarily have taken cognizance of the entire felony (i).

So it has been holden, that a man, guilty of a nuisance in one county to the damage of another county, might

(g) *R. v. Taylor*, 3 B. & P. 596.

(h) 1 East, P. C. Addenda, p. 24.

(i) Hale, 652.

be indicted in the first (*k*), or, according to Hawkins, in either county.

So where A. by reason of the tenure of certain lands in the county of B. is bound to repair a bridge in the county of C. if the bridge be in decay, he may be indicted in the latter county (*l*).

An usurious contract having been made in London, the lender received money as the borrower's agent in Middlesex, and on accounting in London for the amount of those receipts, deducted the usurious interest. It was holden, in an action founded on this transaction, that the venue was well laid in London; and it was intimated by the court, that when a penal action is founded on facts arising in two counties, the venue *ex necessitate* may be laid in either (*m*).

An indictment (*n*) for a conspiracy may be tried in any county, in which an overt act has been committed in pursuance of the original illegal combination and design; so that where several conspired upon the high seas, to fabricate false vouchers to defraud certain commissioners in Middlesex, and in consequence those vouchers were delivered by innocent persons, their agents in Middlesex, the court intimated an opinion, that the offence had been properly tried in Middlesex, in analogy to the case of treason, which offence may be tried in any county in which an overt act has been committed.

So several defendants were holden to have been properly convicted upon an indictment for a conspiracy, though no joint conspiracy had been proved in the county where they were tried, but only overt acts done

(*k*) Staun. b. 2. 91. 19 E. 3.
Ass. pl. 6.

(*m*) 2 T. R. 238. 2 B. and P.
381. 2 Taunt. 252.

(*l*) 5 T. R. 498. 5 H. 7. 3.
contra.

(*n*) *R. v. Brisac*, 4 East, 164.

in consequence of a general conspiracy, evidenced by various acts in other counties (*o*).

And in case of *misdemeanors*, since all procurers are principals, the procurer is guilty of the offence wherever it is committed, in consequence of his procurement.

Thus if A. procure B. to publish a libel, A. is liable to be indicted (*p*) in every county in which B. publishes that libel (*q*). So if A. abroad, procure false vouchers to be delivered in Middlesex, which he has fabricated for the purpose of fraud, he is indictable in Middlesex (*r*).

An action of *scandalum magnatum*, which partakes of the nature (*s*) of a criminal proceeding, may be brought in any county, because the scandal raised of a peer reflects upon him throughout the kingdom.

Under the stat. 3 G. 2. c. 26. s. 4. against selling coals represented to be of a different quality from what they really are, the offence is completed, and ought to be tried in the county in which they have been delivered, though the contract of sale was made in a different county (*t*).

But under the same stat. s. 13. the offence of filling sacks with coals for sale, without first having duly measured them at the wharf or warehouse, is local, and must be tried in the county where the wharf or warehouse lies (*u*).

Where time is an ingredient in the description of the offence, as in cases of homicide, where to inculcate the person striking, the death must happen within a year and

(*o*) *R. v. Bowes and others*.
See 4 East, 171.

(*p*) *R. v. Johnson*, 7 East,
65.

(*q*) See also *Girdwood's case*,
post. and Leach, 169.

(*r*) *R. v. Brisac*, 4 East, 164.

(*s*) Gil. C. P. 90.

(*t*) 4 East, 385.

(*u*) 4 East, 385. By stat.
31 Eliz. c. 5. s. 1. relating to
informations and actions upon
penal statutes, the offence shall
be laid to be done in the county
where it was done. The same
is enacted by 21 Jac. 1. c. 4.
with respect to actions by com-
mon informers.

a day after the stroke, or where a particular time is limited for commencing the prosecution by particular statutes, it is in general necessary, that the liability of the defendant, in point of time, should appear upon the face of the indictment; but this matter will afterwards be more fully considered, in common with the other averments connected with time (x).

Where the jurisdiction of the court depends upon particular circumstances, exclusive of the offence itself, it is frequently unnecessary to aver them upon the face of the indictment. Thus, though the common commission of gaol delivery extends only to prisoners in actual custody, it need not be averred upon the indictment, that the defendant was then in prison (y). So where the crown issues a commission to try certain persons in custody before a particular day, the indictment need not allege that the defendant was in custody before that day (z). So in an indictment for receiving stolen goods, under the statute 22 G. 3. c. 58. which authorizes the trial of the receiver for a misdemeanor, where the principal has not been convicted, it is unnecessary to aver, that the principal has not been convicted, though certainly it is that negative circumstance which gives the court jurisdiction (a).

(x) *Stowe's case*, Cro. J. 603. Doug. 235.

(y) *Berwick's case*, Fost. 10. 12 Mod. 449.

(z) *Berwick's case*, Fost. 10.

But note, this did appear upon the record, which alleged that the prisoner, at the time of arraignment (which was before the day limited by the commission), being brought to the bar in custody of the sheriff,

to whose custody he had before been committed, &c. And in the case of *Angus Macdonald*, Fost. 59. where this answer could not be given, for the day was past at the time of trial, it was thought fit to introduce the special averment into the indictment.

(a) *Baxter's case*, Leach, 660. 5 T. R. 85. *Pollard's case*, 2 Ld. Ray. 1370.

Where an indictment has been removed into the Court of King's Bench by certiorari, if a case be made out which shews that the justice of the case requires it, the court will direct the trial to be had in the next adjoining county (*b*). As in the case of an indictment against a county for not repairing a bridge, where, if the indictment were not removed, part of the defendants would be the jurors (*c*). When this alteration is made, the venue remains as before (*d*). By the stat. 38 G. 3. c. 52. if the venue in any indictment or information be laid in the county of any city or town corporate, the court may, upon the application of either party, (with some exception,) direct the issues joined to be tried by a jury of the county next adjoining. (*e*).

(*b*) 2 Str. 874. 4 East, 210.

Clift. Ent. 741. 6 T. R. 194.

This is done upon a suggestion entered upon the roll by leave of the court, that a fair and impartial trial cannot be had in the proper county, 7 T. R. 735.

But as this suggestion is not traversable, the court will require a strong case to be made

out before they will allow it to be entered.

(*c*) 6 T. R. 194.

(*d*) 1 Bl. 179.

(*e*) The applicant must enter into a recognizance in the sum of £40. to pay the entire costs. See the stat. 51 G. 3. c. 100. as to the sentence in such case.

CHAP. II.

Of the Joinder of Parties and Offences.

- I. *Joinder of Defendants*, p. 31 to 38.
- II. *Of Offences*, p. 38 to 42.
- III. *Of Defendants and Offences*, p. 42 to 44.

IT is next to be considered, what parties are to be selected as the objects of the charge; and, at the same time, it will be convenient to inquire, what offences may, in the same indictment, be charged against the same or different defendants.

It seldom happens that an indictment is defective for want of including a sufficient number of parties charged with the offence, since, technically speaking, torts are several in their nature; and where several join in the same criminal act, each is severally amenable to justice for the consequences.

And even where a duty is thrown upon several, each individual, so bound, is responsible for criminal omissions, as well as for criminal acts (*a*).

There are, however, some exceptions to this rule: thus, an indictment for a conspiracy cannot charge the offence against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual (*b*). But the indictment may allege that the defendant, together with other persons, committed the offence.

(*a*) *R. v. Holland*, 5 T. R. 12 Mod. 262. Com. Dig. Information. D. 7. Salk. 593.

(*b*) Str. 193. *R. v. Sudbury*,

The same observation is applicable to an indictment for a riot (c), where the offence must be alleged to have been committed by more than one. On the other hand, an indictment may be defective for charging too many, as where an indictment for *concealing* the death of a bastard child, alleged the presence of an accomplice (d).

Where a duty is thrown upon a body of people, as the inhabitants of a county, or of a particular parish, the indictment must not be confined to any smaller class (e) or subdivision. It was once indeed holden, that where a parish is situated in two counties, and a road in part of the parish within one of the counties is out of repair, the indictment ought to be laid against the division of the parish which lies in that county (f); for the court thought, that if this were not allowed, there would be a failure of justice; but it was afterwards considered, that the doctrine was not tenable, and was founded in a mistake, since the whole parish might, by proper measures, be punished for the default (g).

With respect to the joinder of several defendants, in respect of the same or different offences, it may be considered,

1. When several may be *jointly indicted* in respect of the same offence.
2. What offences may be charged against the *same defendant* in the same indictment.
3. How far *different persons* may be charged in the same indictment with *different offences*.

(c) *Ib.* Co. Litt. s. 431.

(f) *R. v. Weston*, 4 Burr.

(d) *Jane Peat's case*, East, 2507. 5 Burr. 2700.

P. C. 229.

(g) 5 T. R. 498.; i. e. by re-

(e) 5 T. R. 498.

moving the indictment into the Court of K. B.

1. The rule seems to be well established, that *several may be jointly indicted for offences arising wholly out of the same joint act or omission.*

Thus in the case (*h*) of obtaining money under false pretences, if several defendants act in concert together, though the pretence be conveyed by words spoken by one of them, yet they may all be jointly indicted under the statute (*i*).

So several persons have been convicted under the Black Act for a shooting at the prosecutor by one of them, and though they were all jointly charged with the single act, the indictment was holden to be good by all the judges (*k*).

So where several join in a conspiracy to give an untrue verdict (*l*), or join in a suit in the admiralty on a contract on land (*m*), or commit a joint trespass (*n*) upon two persons, or are jointly concerned in the publication of the same libel (*o*). So the husband and wife may be joined for the same treason, murder, trespass, or nuisance (*p*). So

(*h*) *R. v. Young*, 3 T. R. 98.

(*i*) 30 G. 2. c. 24.

(*k*) See the *Coalheavers'* case, *Leach*, 76. 576. 396. and 3 T. R. 105.

(*l*) 2 Haw. c. 25. s. 89.

(*m*) 2 Haw. c. 25. s. 89.

(*n*) 1 Salk. 384. *R. v. Benfield*, 2 Burr. 984. *R. v. Clendon*, Str. 870. contra.

(*o*) 2 Burr. 984.

(*p*) Salk. 385. Kel. 31. In burglary and other felonies, except murder, if the wife be present, she is presumed to act

under the coercion of her husband, Kel. 31. But an indictment may be good, though it allege that the husband and wife jointly committed any other felony; for the coverture does not warrant more than a *prima facie* presumption, that the wife acted under control. See 1 Hale, 516. and *R. v. Hughes, &c.* Russel, 1478. And the husband may be convicted and the wife acquitted, upon the presumption of her husband's coercion. See 27 Ass. 40. Fitz. Coron. 160. 2. E. 3. Staunf. P. C. f. 26,

two may be jointly indicted for extortion (*q*), or for omission of a joint duty (*r*), for the joint keeping a gaming-house (*s*), the unlawful hunting and carrying away of deer (*t*). So two may be jointly convicted for maintenance (*u*).

But in all such cases, with the exception of conspiracy, riot, &c. though several defendants be jointly indicted each might have been severally charged; and the rule is the same where a duty is thrown upon a body of persons, for each is severally liable for omissions as well as acts (*x*), and consequently, though several be charged jointly in the same indictment, some may be convicted and the rest acquitted, for the law looks upon the charge as several against each (*y*).

And the rule holds, though the parties concurring in the same act, be guilty of offences which differ in degree.

Thus if a wife join with a stranger in the murder of her husband, they may be jointly indicted, though the wife be guilty of petit treason, the stranger of murder only (*z*).

And the offence may be alleged to have been committed jointly by all whom the law considers as principals.

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| Kel. 37. 1 Hale 45. 516. East's | (<i>q</i>) 1 Salk. 382. |
| P. C. 559. 1 Hale, 45, 46. | (<i>r</i>) 5 T. R. 498. |
| Kel. 37. The husband and | (<i>s</i>) 2 Haw. c. 25. s. 89. |
| wife were charged in the same | 10 Mod. 335. 2 Hale, 174. |
| indictment and convicted; the | (<i>t</i>) 2 Haw. c. 25. s. 89. |
| wife as a principal felon, the | (<i>u</i>) 1 Vent. 302. |
| husband as an accessory before | (<i>x</i>) <i>R. v. Hollond</i> , 5 T. R. |
| the fact, <i>R. v. Morris and his</i> | 607. |
| <i>wife</i> , Leach. 1096. The wife | (<i>y</i>) 2 Haw. c. 25. s. 89. |
| may be convicted in a summary | (<i>z</i>) Fost. 329. 2 Hale, 165. |
| way, before two magistrates, | |
| without the husband, <i>R. v.</i> | |
| <i>Crofts</i> , 2 Str. 1120. | |

pals in the commission of any offence; and, therefore, in the cases of high treason, petit larciny, mayhem, and all misdemeanors inferior to felony, the act of one being in law the act of the rest, they may all be charged jointly with the commission of the offence (*a*).

In cases of felony, where several are present, some committing the act, the others aiding and abetting, the latter may be charged either as principals or as abettors (*b*). And where a statute creates a new felony, it possesses all the incidents to a felony at common law, and therefore makes all the aiders and abettors principals (*c*).

Where several are guilty of different felonies in respect of the same transaction, though the act cannot, unless they be all present actually or constructively, be *jointly* charged, yet it is the common practice to join the principal and his accessories before and after the fact, in the same indictment (*d*).

Several present at the death of a man may be charged with different degrees of homicide in the same indictment: thus, if A. with malice abet B., who gives the blow *without malice*, it is murder in the former, and but manslaughter in the latter, and so it may be charged in the indictment (*e*).

But if the bill charge both with murder, and the grand jury find it murder in one, and but manslaughter in the other, there should be a new bill for manslaughter against the last (*f*).

But unless the offence arise *wholly* out of the same joint

(*a*) *R. v. Johnson*, 7 East, 65.
4 Bl. Com. 36. 1 Hale, 615.

(*b*) Vide the *Coalheavers'*
case, Leach, 78.

(*c*) *b*.

(*d*) 2 Hale, 173.

(*e*) 3 Buls. 206. 2 Haw.
c. 29. s. 7. *Taylor and Shaw's*
case, Leach, 398. *Mackally's*
case, 9 Co.

(*f*) 3 Buls. 206.

act or omission, the rule fails. Thus, if several j work at a trade within the statute of Elizabeth (g) cannot be jointly indicted; for the want of qualific by serving an apprenticeship, occasions the crime, that defect is several in its nature and confined to each. So several cannot be jointly indicted for the same jury (i), nor as common scolds (k), nor for the same retry (l), nor for the non-repair of the street before houses (m). And a misjoinder of this kind is fatal in rest of judgment (n), and would be equally objection on demurrer.

Kingston (o) and eight others were indicted for a j contempt in disobeying an order of sessions, directing payment of certain costs by commissioners, of whom defendants were nine. The first count alleged, that tice of this order had been served upon four of the fendants named in the indictment, and also upon a fi commissioner, who was not included in the indictment and then charged those four and two others jointly with the contempt in refusing to obey the order. And upon a general demurrer it was held, that the count was bad because it charged six with the contempt, four only having been personally served, and that it was necessary to allege a personal service upon all who should be charged with the contempt.

Where several are concerned in executing the same treasonable design or conspiracy, it is desirable to include them all in one indictment.

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| (g) 5 Eliz. c. 4. | (k) Str. 921. |
| (h) 1 Salk. 382. 1 Vent. . | (l) Str. 921, |
| 302. 2 Roll. 81. | (m) 2 Haw. c. 25. s. 89. |
| (i) <i>R. v. Phillips</i> , Str. 921.. | (n) Str. 921. |
| 3 Leon. 230. Salk. 382. 6 Mod. | (o) 8 East, 41. |
| 24. | |

In the reign of Charles the Second, Sir Geoffery Palmer, attorney-general, being directed to proceed against Messenger and others, who had conspired to pull down bawdy-houses, &c. proceeded by four separate indictments; and with this Kelynge, C. J. found fault; because by that means, he said, the king's evidence would be broken, whereas if all had been put into one indictment, the evidence as to the main design would have been entire against all; and then the assembling in several places to the same intent, had made the matter more foul, and would have been aptly given in evidence against all to the same jury (*p*).

Since every offence, though jointly charged, is in law the several offence of each defendant, it follows, that one or more may be convicted upon a joint indictment, and the rest acquitted (*q*).

And so it should seem, that in some instances, defen-

(*p*) Though several be jointly indicted for the same crime, yet the indictment is several against each; and, except in an indictment for a conspiracy, riot, &c. they may be put severally upon their trials, Kel. 9. And if, in such case, some of them be found guilty by one jury, this is no cause of challenge to the rest, for the crime of each is several; one may be guilty, and not another, and the jury are to give their verdict upon the particular evidence against each, Kel. 9. challenged by one must be withdrawn as to all; because, the pannel being joint, a juror cannot be withdrawn as to one and serve as to another, 2 Hale, 268. 9 E. 4. 27. Plow. Com. 100. But, in such case, the pannel may be severed, and the same jury returned between the king, and every one of the prisoners, and then they are to be tried severally, and the challenge by one prisoner will not disable the juror as to the rest. Kel. 9.

9. Where several prisoners are put upon one jury, and sever in their challenges, the juror

(*q*) Kel. 9.; except in cases of riot and conspiracy, Str. 193. 194. Com. Dig. Inf. D. 7.

dants jointly indicted may be convicted of offences differing in degree: for as two may be indicted jointly for the offence of a third, though it be petit treason in the first, and murder or manslaughter in the second (*r*), as alleged in the indictment, and as in a joint indictment it may be laid as murder in one, and but manslaughter in the other, there seems to be no reason why the jury, where several are jointly charged with murder, should not find one guilty of murder and the other of manslaughter, should the evidence warrant such a conclusion. It was held, indeed, in *Turner's case* (*s*), where several were jointly indicted for a burglary, that the jury could not find one guilty of burglary and the other of larceny only; there the very nature of the case precluded such a finding, for the evidence was the same as to all. But upon a joint indictment for petit treason, if it turned out that one defendant was servant to the deceased, and the other a stranger; or if, upon a joint indictment for murder, it appeared, that he who abetted, acted of malice prepense, but that he who struck did not maliciously strike, the finding the parties guilty of offences differing in degree, would not be inconsistent. And in the case of burglary, if it appeared in evidence that one of the prisoners who had assisted in the removal of the goods had been a stranger to the breaking in, and had taken no part in the transaction until after the breaking had been accomplished; there seems to be no satisfactory reason why the jury should not find according to the fact, and why separate judgments should not be pronounced just as if the prisoners had been separately tried and convicted.

(*r*) Fost. 106, 329. Com. Dig. Ind. F.

(*s*) 1 Sid. 171.

II. Of charging several offences against the same defendant.

If several felonies be charged (*t*) against a prisoner in the same indictment, it is no objection either upon demurrer, or in arrest of judgment; for on the face of an indictment, every distinct count imports to be for a different offence. But if it appear, before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice for judges to quash the indictment, least it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a jurymen's trying one of the offences, though he might not object to his trying the other. But if the joinder of two distinct felonies be not discovered before the prisoner has pleaded, the court in its discretion may put the prosecutor to elect (*u*) on which he will proceed.

But if no more than one transaction be given in evidence, as that the prisoner at one and the same time uttered a whole bundle of forged Bank receipts, the court will not put the prosecutor to his election (*v*).

But though two different felonies ought not to be included in the same indictment against the same defendant, yet the same act may be charged as a different offence in different counts (*x*). Thus a count for a robbery has been joined with another for stealing privately from the per-

(*t*) 8 East, 41. East, P. C. 132. *R. v. Kingston*, 8 East, 515. Per Buller, 3 T. R. 106. 41.

2 Hale, 173. contra, cites 21 E. 4. (v) *R. v. Thomas*, East. P. C. 934.

(*u*) 3 T. R. 106. Leach, 568. 531. *R. v. Jones*, 2 Camp. (x) Leach, 568. *Thompson's case*, East. P. C. 515.

son (y); and Lord Hale speaks of a bill, containing two offences, as burglary and theft, forcible entry and detainer as usual in practice (z). And it is the common practice to charge the forgery of a bill or note, and the uttering of it with a guilty knowledge in different counts of the same indictment. So a count for embezzling Bank notes may be joined with a count for larciny (a).

A prisoner may be indicted for petty treason and murder at the same time, and may be found guilty of the murder, and acquitted of the treason (b).

If the special description of the offence in the indictment include a more general offence, the prisoner may be found guilty of the latter and acquitted of the former. Thus if an indictment for burglary be laid with a felony to the amount of 40s., the prisoner may be acquitted of the burglary, and be found guilty of stealing in the dwelling-house to the amount of 40s. (c).

So under an indictment for burglariously breaking in and stealing, the charge may be modified by shewing a stealing without any breaking in (d).

So under an indictment for stealing in a dwelling-house

(y) Leach, 531. Qu. whether this be consistent with the oath of a grand juror?

(z) 2 Hale, 163, 173. Yel. 99. *Ford's case*.

(a) *R. v. Johnson*, 3 M. & S. 539. See the precedent *infra*.

(b) Leach, 512. Fost. 328. 106. 10 St. Tr. 36.

(c) Leach, 102. 816.

(d) Leach, 816. But in such

case an acquittal of the larciny would amount to an acquittal of the burglary; for though the allegation of the theft be a sufficient allegation of the felonious intention, yet when acquitted of that, the matter stands as if he had been indicted for the breaking without any felonious intent. See 1 Hale, 560. East, P. C. 348. 518. 1 Sid. 171.

Of several Offences against the same Party. 41

and putting in fear, the prisoner may be convicted of a simple larciny (e).

And *in general* whenever an offence, as described in the indictment, is made up partly of facts and circumstances which constitute a less aggravated offence, and partly of circumstances peculiar to itself, the defendant may, if the evidence warrant such a conclusion, be found guilty of the more simple and acquitted of the more serious offence. So that where the indictment charges the defendant with petit treason, he may be found guilty of murder, or of any inferior species of felony, the treason being a circumstance of aggravation of which the defendant may be acquitted, and yet found guilty of the substantial part of the charge (f).

(e) Leach, 771.

(f) Fost. 328. 1 Hale, 378, 449. 2 Hale, 184, 302. 2 Haw. c. 47. s. 8. Radbourne's case, Leach, 513. 2 Haw. c. 23. s. 95.

But the converse of the proposition is not so clear, for, by charging the defendant with murder, where the facts amount to petit treason, he is barred of his right to a peremptory challenge of thirty-five, and the judgments are different; and, on this account, Mr. Justice Foster, though he was satisfied that petit treason and murder are in law but one offence, said, that if, on an indictment for murder, the prisoner appeared

to have been guilty of petit treason, it would not be advisable to direct the jury to acquit, least the defendant should afterwards plead *autre-fois acquit*, but that he (if the case occurred) should discharge the jury of that indictment, and direct a fresh one to be preferred, Fost. 328.; and see the case of *Swan and Jefferies*, Fost. 304. So if the indictment charge a misdemeanor below felony, and the offence upon trial appear to be felony, it seems the defendant ought not to be found guilty of the misdemeanor, but should be indicted afresh for the felony. See *R. v. Cross*, 12 Mod. 520. 634.

So a man indicted for murder may be acquitted of the murder and found guilty of manslaughter, because manslaughter is included in the charge of murder. The offences differ only in the circumstance of malice prepeuse, which, taken from a charge of murder, reduces it to manslaughter, and added to circumstances amounting to manslaughter, constitutes murder (g). And for this reason it is in many instances unnecessary to subjoin to a special count describing the *aggravated offence* other counts, which differ only in the *omission of the particular allegations* in which the aggravation consists (h).

But the above rule must be understood with this limitation, that a charge of felony cannot be modified into a misdemeanor, since the defendant would thereby lose the benefit of full counsel, of a copy of the indictment, and of a special jury (i). Judgment, therefore, cannot be pronounced as for a trespass, where the defendant has been convicted of stealing that which is not the subject matter of felony (k).

So if the indictment charge a felony, and the facts found by a special verdict amount to a *misdemeanor* only, judgment cannot be given as for a *trespass* (l). And if two be indicted for felony, and it turn out to be felony in one, and but trespass in the other, the latter is intitled to an acquittal (m).

And it is improper to prefer two indictments at the

(g) Fost. 328.

(k) *R. v. Westbeer*, Str. 1133.

(h) Even though the special count conclude against the statute. See tit. Ind. on Statute.

2 H. 7. 10. b. contra. Kel. 29.
2 Haw. c. 47. s. 8.

(l) *Ib.*

(i) Leach, 15. Vid. Cro. Car. 332. Cro. J. 497. Kel. 29. *R. v. Scholefield*, Cald. 401. 1 And. 351.

(m) 2 Haw. c. 47. s. 8.

same time for the same act, one laying it as a felony, and the other as a misdemeanor (n).

And since different judgments are required, it seems that the joinder of a count for a felony, with another for a misdemeanor, would be holden to be bad upon demurrer, or after a general verdict, upon motion in arrest of judgment (o). But it is no objection to an indictment, that it charges different misdemeanors upon the defendant in different counts, for the judgment is of the same (p) nature. And the joinder is good although the indictment for one of the offences be positive, and the judgment for the other discretionary (q).

III. Of the Joinder of different Persons and different Offences.

But though an indictment would be vicious which alleged that several persons, jointly, committed an offence, which from its nature must have been the several offence of each; yet if, in the same indictment, as found by the grand jury, *several offences* be alleged to have been committed by *several persons*, no advantage it seems can be taken, either upon demurrer or in arrest of judgment, though the court will, in its discretion, either quash the indictment altogether, or use such measures as shall obviate any inconvenience (r) to the defendants which might otherwise arise. For the charging the offences to have been committed severally, makes each such charge a separate indictment. And though there are instances where indictments have been quashed for charging several of-

(n) *Doran's case*, Leach, 608.

(q) *R. v. Darley Hill*, 4 East,

(o) 3 T. R. 108.

174.

(p) 3 T. R. 108. 2 Burr.

(r) 3 T. R. 106. *R. v.*

984. 8 East, 41. *R. v. Jones*, *Kingston*, 8 East, 46.

2 Camp. 132.

fences to have been committed by several persons, as against several officers, *quod colore officiorum suorum separaliter* (s), *extorsive ceperunt*, &c.; yet there are a great number of authorities which shew that an indictment charging the offences to have been committed *separaliter*, would be good.

Thus, though an indictment against four persons for erecting four several inns, and selling victuals to travellers *ad commune nocumentum* (t), was quashed, yet it was for want of alleging that they did the acts *separaliter*, which would have made the charges as several indictments.

And according to Lord Hale (u), "It is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, and they are daily convict upon such indictments, for the word *separaliter* makes them separate indictments."

But it seems, that to warrant such a joinder in the same indictment, the offences must be of the same nature, and such as will admit of the same plea and the same judgment (x).

It does not appear to have been allowable to join charges of different felonies against different persons, in the same indictment, unless such felonies arose out of the same transaction.

But where the felonies have been immediately connected, as in the case of a principal and his accessories, either before or after the offence, it has been the usual course to include them in the same indictment (y).

(s) 2 Hale, 174.

(u) 2 Hale, 174, 3 T. R. 106.

(t) 2 Roll. Rep. 345, and per Lawrence, J. 8 East. 47. 2 Hale, 174.

(x) 8 East, 46. 2 Hale, 174.

3 T. R. 106. 2 Camp. 132,

Hale, 174.

(y) 2 Hale, 173.

CHAP. III.

*Of the Description of the Defendant.*I. *At common Law.*II. *Under the Statute of Additions, p. 47.*

1. **AT** common law it seems to have been sufficient to describe the defendant by his christian and surname, unless he was of the degree of a knight or some higher dignity, in which case the name of dignity (*a*) was required to be added to the name of baptism and surname (*b*), or in case of nobility, to supply the place of the surname. And if he were indicted in respect of his office (*c*), an addition of his office was necessary. With respect to the name of the party, there is much doubt in the books, whether certainty of both christian and surname was required in an indictment.

According to some authorities, the defendant was bound to answer to an indictment for felony, though his *name of baptism* was mistaken (*d*).

(*a*) 11 H. 4. 40. Com. Dig. Ind. G. 1. 2 Ins. 665, 666. 10 E. 4. 16. 11 H. 6. 11.

(*b*) 2 Ins. 665, 666.

(*c*) Com. Dig. Ind. G. 1.

(*d*) Lord Hale (2 Hale, 238.) considers this as the better opinion, and cites 1 H. 5. 5. and 3 H. 6. 26.

But the case 1 H. 5. 5. is not a direct authority for this purpose, for there the misnomer was of the surname, and not of

the name of baptism. Hankford, justice, held, generally, that misnomer could in *no case* be pleaded to an indictment for *felony*. In 3 H. 6. 26. there is nothing more than an *obiter dictum* by Rolfe the counsel, and this is directly contrary to the Abbot of *Colchester's* case, 11 H. 4. 41. See *Gerard's* case, 2 Hale, 237. 2 Haw. c. 25. s. 68, 69.

According to others, no advantage could be taken of a mistake in the *surname* (e), though there might of a mistake in the *christian name* (f).

But Lord Hale was of opinion that it was safest to allow a plea of misnomer of either christian name or surname (g). And it is difficult to conceive why the one should not be allowed as well as the other; the reason of requiring certainty, in either case, is in order to identify the party arraigned or outlawed with the person against whom the indictment is found, for which purpose certainty in both christian and surname is material, of the latter indeed more than the former, since there is a greater variety of surnames than of names of baptism; and therefore the former serve to identify with greater precision than the latter.

In a recent case it was holden, that one indicted for a misdemeanor might plead that his name was Shakespeare, and not Shakepeare, for the latter is not *idem sonans* (h).

And it has been holden that a person cannot have two christian names, and therefore an indictment was quashed which described the defendant by the name of Elizabeth

(e) 1 H. 5. 56. Staunf. P. C. 1. 3. c. 18. f. 182.

(f) 2 Haw. c. 25. 68, 69. 11 H. 4. 40. 2 Hal. 238. *Lay-er's case*, 6 St. Tr. 237.

By an act of attainder, 1 G. 1. it was enacted, that if Major-General Thomas Gordon, Laird of Auchintoule, should not render himself before such a day, he should be attainted of high treason. Major-General Gordon's christian name was Alex-

ander; and all the judges held, that if Alexander Gordon, upon such an attainder, had been brought to the King's Bench bar, and had made this matter appear, the court could not have awarded execution against him. 1 P. Wills. 617. See Lord *Pitsligo's case*, Fost. 79.

(g) 2 Hale, 176.

(h) *R. v. Shakespeare*, 10 East, 83.

Newman, *alias* Judith Hancock (*i*). But the defendant may be described by a second surname if it be laid under an *alias*, for a man may be known by two surnames (*k*).

If the defendant, in an appeal or indictment, plead misnomer of his surname, the plaintiff or the king may aver *que conus per l'un nosme et l'autre* (*l*). But little advantage is gained by a plea of this nature; since, as will afterwards be seen, the defendant must in his plea set forth his real name, upon which a new indictment may be found, which will conclude him (*m*).

But in some instances an indictment at common law is good, without naming any person certain, as if it state an highway to be out of repair through the default of the inhabitants, without naming them (*n*).

II. *Under the statute of additions.*

To prevent the inconvenience of mistaking one person for another, which might frequently arise were the party to be described by his name only (*o*), the stat. 1 H. 5. c. 5. enacts, that in all appeals and indictments (*p*), in which the exigent shall be awarded, to the names of the defendants, additions shall be made for their *estate, or degree, or mystery, or of the towns, hamlets, or places, and counties*, of which they were or be, or in which they be or were conversant; and then directs, that if these additions be omitted, any outlawry pronounced on the pro-

(*i*) 1 Ld. Ray. 562. tamen qu. and vid. 6 Mod. 116. 1 Camp. 479. 1 Chitty's Crim. L. p. 202.

(*n*) 2 Roll. Ab. 79.

(*o*) 21 E. 4. 72. 2 Ins. 670.

2 Hale, 176. 2 Haw. c. 23. s. 105.

(*k*) *Sample's case*, Leach, 469. 1 H. 7. 28. Bro. Misno. 47.

(*p*) Presentments are within the statute, although they are not mentioned in it. Burr.

(*l*) 1 H. 7. 29. 2 Hale, 238. 2556. Leon. 200.

(*m*) 2 Hale, 238.

cess shall be bad, and that before the outlawries pronounced, the said writs or indictments, shall be *abated* by the exception of the party wherein the said additions be omitted.

Under this statute it has been holden, with respect to *estate or degree*, that these two words are of the same signification, comprehending the nobility, clergy, graduates in any profession, and those under the degree of nobility, as yeoman, &c. (*q*); that the party must be described by his present estate or degree (*r*); and therefore, to describe him as *nuper armiger*, &c. is insufficient. That he cannot be described by any dignity, which he holds in any nation except England (*s*); yet it has been said, that an Irish bishop may be described by the addition of his diocese (*t*).

The degree of serjeant at law, is a good addition (*u*); so for a man, esquire, gentleman (*x*), yeoman (*y*), and labourer, are good additions; but burgess (*z*), citizen (*a*), and servant (*b*) are too general.

The defendant may be described by his dignity by creation (*c*), as earl; by his name of dignity, as garter (*d*); by his reputed degree, as if a yeoman be styled gentleman, it will be sufficient, if he be so reputed (*e*); but if he be not

(*q*) 2 Ins. 666.

(*x*) B. Add. 5.

(*r*) 9 E. 4. 2. 22 E. 4. 13.

(*y*) 2 Ins. 668.

21 H. 6. 3. 3 Ins. 670.

(*z*) Ib.

(*s*) Leach, 620. 9 Co. 118.

(*a*) Ib.

Mary Graham's case, Salk. 451.

(*b*) 2 Ins. 666. Com. Dig.

(*t*) Year-book, 21 H. 6. 3.

Ind. G. 1.

pl. 4. A degree in the university is a good addition, 2 Ins.

(*c*) 2 Haw. c. 25. s. 69. Cro. Eliz. 224. 542.

668. 2 Haw. c. 23. s. 100.

(*d*) 2 Ins. 668.

(*u*) 2 Ins. 667, 668. B. Add.

(*e*) 2 Ins. 667, 668,

347.

so reputed, the indictment may be quashed (*f*); so if the defendant be described Sir I. S. knight, he may plead that he is a baronet (*g*).

The addition of office is insufficient, unless the party be indicted in respect of his office (*h*). So to describe one as an extortioner, maintainer, or by any other unlawful practice, is bad (*i*).

When a person has two names of dignity, the highest is most proper (*k*).

In an indictment against a peer, no addition is necessary, unless it be for treason, felony, or breach of the peace; for in other cases no process of outlawry lies against him (*l*).

A female may be described as single woman, spinster, widow (*m*), the wife of I. S. yeoman (*n*); but to describe her as A. the wife of B. *spinster* is bad, for spinster may be referred to either A. or B. (*o*).

But an indictment against J. B. husband of E. B. late of C. yeoman, is good, because yeoman cannot be applied to the wife (*p*).

If a gentlewoman be named spinster, she may plead in abatement; for, according to Lord Coke, she has as good a right to that addition as a baroness, viscountess, &c. has to hers (*q*).

Where the defendant is of the greater order of nobility, the description of his dignity precedes that of the place,

(*f*) 2 Ins. 667, 668.

(*m*) B. Add. 66. 10 H. 6.

(*g*) 2 Haw. c. 25. s. 69. Cro. 21.

Car. 371. Jones, 346.

(*n*) Gower's case, Dy. 47. a.

(*h*) Com. Dig. Ind. G. 1.

Cro. Eliz. 750. 4 H. 6. 4. b.

(*i*) 2 Ins. 668.

(*o*) Dyer, 47. 2 Hale, 177.

(*k*) 2 Ins. 669.

(*p*) Dyer, 47. 2 Hale, 177.

(*l*) Cro. Eliz. 148. Lord

(*q*) 2 Ins. 668.

Dacre's case, 2 Hale, 177. 199.

Cro. Eliz. 503.

as Edward, duke of Buckingham, late of N. in the county of G. (*r*).

But, in case of the lesser nobility, such as baronets and knights, the description is different, and runs thus—A. B. late of M. in the county of N. knight, &c. (*s*).

An addition after an *alias dictus* is insufficient (*t*), it must be subjoined to the first name; and after an *alias dictus* it is unnecessary (*u*). Though several defendants have the same addition, it should be repeated after each; (*x*) where both the name and addition are the same, there should be some further description added for the sake of distinction (*y*). It is laid down, by Serjeant Hawkins, that a defect as to the addition of one of several defendants will vitiate the indictment as to all (*z*); but this seems to be erroneous and unreasonable, for the law considers the indictment as several against each of the several defendants (*a*).

With respect to the addition of the party's mystery, the following are sufficient.

Labourer (*b*), husbandmen (*b*), merchant (*c*), broker (*d*), taylor (*e*), hostler (*f*), smith (*g*), miller (*h*), carpenter (*i*),

(*r*) 2 Ins. 669. So where one is named of a city, which is a county of itself, as J. S. baker, of London, in the county of the city of London, but J. S. of London, baker, would be sufficient. 4 E. 4. 10.

(*s*) 2 Ins. 669.

(*t*) 2 Ins. 669. Semple's case, Leach, 469. Cro. Eliz. 583. Dyer, 88. Cro. Eliz. 249. 198. Staunf. 68. 2 Hale, 177.

(*u*) 2 Haw. c. 25. s. 70.

(*x*) 2 Haw. c. 25. s. 70.

(*y*) 2 Haw. c. 25. s. 70.

(*z*) 2 Haw. c. 25. s. 70.

1 Bulstrode, 183.

(*a*) Hale, 177. 14 H. 6. 15.

(*b*) 2 Ins. 668.

(*c*) Br. Add. 44. 50.

(*d*) B. Add. 8. 9 H. 6. 65.

(*e*) B. Add. 15. 39.

(*f*) B. Add. 35. 21 H. 6. 50.

(*g*) 21 H. 6. 54.

(*h*) B. Add. 39. 51.

(*i*) B. Add. 15. 39.

brewer (*k*), baker (*l*), butcher (*m*), parish clerk (*n*), merchant (*o*), fishmonger (*p*), dyer (*q*), schoolmaster (*r*), scrivener.

The following are insufficient :

Maintainer (*s*), extortioner (*t*), vagabond (*u*), heretic (*x*), common informer; so servant, chamberlain, butler, &c. for these do not denote any particular mystery (*y*) and the addition of farmer is questionable (*z*).

Of the addition of the town, hamlet, or place, and county

It is sufficient to describe the plaintiff as *late* of such a place (*a*); but he must be plainly averred to be of the place, as of London, or of Norwich; and it has been holden to be insufficient to describe him as mercator de London (*b*). If there be two towns of the same name, he ought to be named of one of them with certainty; thus, if there be D. magna and D. parva, the addition of D. alone would not be good (*c*), and the defendant might plead, that there are two dales in the same county, called Great Dale and Little Dale, and none without an addition.

So if the same place be sometimes called North Dale and sometimes South Dale, but never Dale simply, the defendant may plead that there is no such town, because

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|--------------------------------------|---------------------------------------|
| (<i>k</i>) Fitz. Utl. 32. 37. 2 | (<i>x</i>) 1 Roll. 190. 22 E. 4. 1. |
| Hale, 177. 7 E. 4. 10. | (<i>y</i>) B. Add. 50. 58. 2 Ins. |
| (<i>l</i>) 6 E. 4. | 668. |
| (<i>m</i>) B. Add. 42. | (<i>z</i>) 2 Ins. 668. B. Add. 10. |
| (<i>n</i>) B. Add. 52. 62. | 28 H. 6. 4. |
| (<i>o</i>) 2 Ins. 668. | (<i>a</i>) 2 Ins. 669. |
| (<i>p</i>) 19 H. 6. 51. | (<i>b</i>) 4 Ed. 4. 10. |
| (<i>q</i>) 5 H. 5. 7. | (<i>c</i>) 2 Ins. 669. 7 H. 6. 39. |
| (<i>r</i>) 2 Leon. 186. | 19 H. 6. 35. 21 E. 4. 51. 10 |
| (<i>s</i>) 9 H. 6. 65. 2 Ins. 668. | H. 7. 4. Rast. 47. 3 H. 6. 8. |
| (<i>t</i>) 9 H. 6. 65. | 7 H. 6. 45. |
| (<i>u</i>) 22 E. 4. 1. 2 Ins. 668. | |

a part of a name is not equivalent to the whole (*d*). But if there be two towns of the same name, without any addition to distinguish them, it seems sufficient to describe the defendant of that place generally (*e*).

So it seems, that to describe the defendant as A. parson of D. is insufficient, since he may be parson without residence (*f*).

Where a hamlet is part of a town, and therefore an inhabitant of the former is also an inhabitant of the latter, the defendant may be described to be of either (*g*).

The statute uses the general term, *place*; if, therefore, the defendant live in any place which has a certain name, it is sufficient to describe him to be of that place, though it be neither a town nor a hamlet (*h*); and it is sufficient to describe the defendant by his parish (*i*), if it contain no more than one town or hamlet, which will be intended until the contrary appear.

Next as to the *county*.—Where a city is a county of itself, it seems that it is sufficient to name the defendant of the city or county generally, as to describe him as late of London, or late of Norwich; for though the city and county be not co-extensive, it is to be intended, that he is an inhabitant of both, till the contrary appear (*k*).

But the county must in all cases be shewn, for the statute mentions the county conjunctively (*l*) with town, or hamlet, or place.

(*d*) 2 Haw. c. 23. s. 121. described of either, if he had
3 H. 6, 8. 14 H. 6. 23. cont, two places of residence. 2 Haw.
7 H. 6. 23. c. 23. s. 103.

(*e*) 2 Haw. c. 23. s. 121.

(*h*) 2 Ins. 669.

(*f*) Com. Dig. Ind. Gr. 1.
qu. et vid. 2 Ins. 669. where it
is said, that the law will pre-
sume residence.

(*i*) 2 Ins. 669. 2 Haw. c. 23.
s. 120.

(*k*) 2 Ins. 669. 21 E. 4. 15.
2 Haw. c. 23. s. 120.

(*g*) 2 Ins. 669. 35 H. 6. 30.
14 H. 6. 23. So he may be

(*l*) Cro. J. 167. 2 Ins. 669.
2 Haw. c. 23. s. 120.

The addition of the wife's place of residence is sufficiently shewn by averring that of the husband, because their residence is presumed to be the same till the contrary be proved (m).

It is a general rule, that a defect of this nature must be pleaded in abatement, and that it is cured by the appearance of the party, and his pleading any other matter ; for he is estopped by his plea by that name, and the gaoler and sheriff, who do execution, shall have advantage of the estoppel (n).

(m) 2 Ins. 669. 2 Theolal. b. 6. (n) 2 Hale, 175. 2 Ins. 669.
c. 14. s. 6. 2 Haw. c. 23. s. 120. Cro. Eliz. 60.

CHAP. IV.

*Of the general Averments of Time and Place.*I. *Averment of Time*, p. 54.II. *Averment of Place*, p. 62.

THE next averments, in the usual order of indictments, relate to the time and place of committing the offence.

The averment of *place* is partly substantial and partly formal; substantial, since it shews the offence to have been committed within the jurisdiction of those who inquire into it, and formerly it was essential to the procuring a jury to be returned from the neighbourhood; formal, because it is satisfied by proof of the commission of the offence within the county, without regard to the particular vill stated in the indictment. The averment of *time* is altogether formal, since it is unnecessary to prove the offence to have been committed at the time alleged in the indictment, unless some time be limited for the prosecution, or time itself be material to the constitution of the offence; these averments therefore convey, in general, little of information either to the defendant or his judges. It is, nevertheless, a general rule, that the time and place (*a*) of every material fact must be plainly and consistently alleged; and such a degree of precision does the law exact in this respect, that any uncertainty or incongruity in the description of time and place will vitiate the indictment.

I. With regard to *time*, it is requisite (with some exceptions) to shew both the *day* and the *year* on which the

(*a*) 5 T. R. 620. 2 Haw. c. 25. s. 77. F. Ind. 28. Dyer, 164. 2 Hale, 177.

offence was committed. It is most usual to specify the year of the king's reign, but it is sufficient if the year be pointed out by other means: thus in the case of the regicides, no year of any king was laid for the king's murder, but the compassing of his death was laid in January, in the 24th year of Charles the First and the murder was laid on the 30th day of the same month of January (b).

It is insufficient to state the day of the month without the year (c).

But the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred, as where the time of the caption of the indictment is stated, and the offence laid to have been committed *primo die post Pasch, ult.* (d). So an indictment laying the offence on the Thursday after the day of Pentecost, in such a year, is good (e). So if it lay it to have been committed on the 10th of March last, if the year can be ascertained by the stile of the sessions before which the indictment was taken (f).

With respect to the *day*, it has been adjudged, that it is sufficient in a conviction to allege the offence to have been committed in the interval between two days specified: thus in *the King v. Chandler* (g), a conviction of the

(b) Kel. 11. It is sufficient to allege the year of the king without adding of his reign, 1 Lev. 140. 2 Haw. c. 23. s. 90.

(c) Com. Dig. Ind. G. 2.

(d) Ibid. and 2 Haw. c. 25. s. 78.

(e) 7 H. 6. 39.

(f) Lamb. b. 4. c. 5. f. 491. 2 Haw. c. 25. s. 78.

(g) Ld. Ray. 581. This mode of pleading has long been usual in informations upon penal statutes. See the Precedents cited, Ld. Ray. 582. and see 10 Mod. 248; 5 Mod. 426. Carth. 502. and there does not appear to be any reason why the offence should not be so laid in indictments, where the day cannot in fact be ascer-

-defendant for having killed ten deer, between the 1st of July and the 10th of September, was holden to be sufficient. A similar conviction for having killed one deer was afterwards holden to be good in *Simpson's* case (*h*). But the court, in the former case, decided on the ground of distinction between convictions and informations or indictments. An information charging the defendant with having been guilty of divers extortions, during a specified time, was deemed to be insufficient on motion in arrest of judgment (*i*); and the court said, it might as well be said an indictment for battery would be good, setting forth that the defendant beat so many of the king's subjects between such a day and such a day, as that the principal indictment was good (*j*). An indictment charging a person that on such a day, and on divers other days and times, he kept a gaming-house, was holden to be good; but as it was uncertain as to all except one day, it was holden that no more than one penalty of forty shillings was recoverable, for the offence on the day which was named with certainty (*k*).

In appeals, the statute of Gloucester required that even the hour should be specified, whence it appears that it was not essential at common law, to state the hour even in appeals, in which as great, and in some respects greater (*l*), certainty was expected than in indictments. In an indictment, however, for burglary, it certainly is necessary to aver that the offence was committed in the *night-time*, and it is usual to allege the hour; and in one

tained; but it is safer to aver some day, though it cannot be proved. See Lev. 71. where several facts were laid to have been committed between two specified days.

(*h*) 10 Mod. 248. 341.

(*i*) *R. v. Roberts*, 4 Mod. 101.

(*j*) See also 2 Haw. c. 25. s. 82.

(*k*) *R. v. Dixon*, 10 Mod. 335.

(*l*) 2 Haw. c. 25. s. 76.

case an indictment was holden to be defective for omitting it (*m*).

But under the stat. 39 Eliz. c. 15. it seems to be sufficient to aver that the offence was committed *tempore diurno*, without specifying the particular hour (*n*).

And in general it is unnecessary to mention the hour in an indictment; and if it be insufficiently alleged, no exception can on that account be taken (*o*).

In alleging a mere neglect or non performance, it is unnecessary to specify either time or place (*p*), as in an indictment against a defendant for not having scoured out a ditch (*q*).

Where an offence is committed by the doing of several acts at separate times, they may be stated to have been done at the same time.

Thus in a prosecution under the stat. 7. G. 3. c. 50. s. 1. against secreting letters containing any bank notes, &c. it appeared that a bank note had been cut into two parts) that the parts had been sent in separate letters at different times, and secreted at different times by the prisoner. The indictment alleged that the defendant did secrete the said letters *then and there* containing the said bank note. The prisoner was convicted, and the judges, upon a case reserved, were of opinion that the conviction was proper (*r*). And in an indictment for high treason, where the overt act consists in levying war, it may be charged to have been committed in one day (*s*).

(*m*) Burn's Justice, tit. Burglary, *R. v. Waddington*, East's P. C. 513.

(*n*) 2 Hale, 179.

(*o*) Clarke's case, 1 Bulst. 203.

(*p*) Com. Dig. Ind. G. 2. 2 Haw. c. 25. s. 79.

(*q*) Lamb, b. 4. c. 5. f. 492. 2 Haw. c. 25. s. 79.

(*r*) *R. v. Moore*, Leach, 655.

(*s*) Fost. 8.

The allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place, have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words, *et ad tunc et ibidem*, and the effect of these words is equivalent to an actual repetition of the time and place (t).

But the mere copulative, without the *ad tunc et ibidem*, would in many cases be insufficient.

Thus to aver that A. at such a time and place, made an assault on B. and with a certain sword feloniously struck, &c. is bad, without saying *then and there* (u).

But if the indictment allege that A. feloniously, and of malice aforethought, made an assault, and with a certain sword, &c. *then and there* struck. &c. this is sufficient; for by the words *then and there*, the words *feloniously and of malice aforethought*, before applied to the assault, are connected with the stroke, and if this were not permitted, it would occasion much tautology and repetition (x).

So in Nicholson's case (y), it was holden by the judges, that an indictment was sufficient which alleged that the prisoner did wilfully, feloniously, and of malice aforethought, mix poison, to wit, arsenic, with flour and milk, with intent that the same should be afterwards baked and eaten by the deceased, and the said flour and milk, so mixed with the poison as aforesaid, did with the intent aforesaid *then and there* deliver to the deceased, &c.

According to Lord Hale (z), this nicety is acquired in *favorem vitæ*, and in some cases of misdemeanor the like strictness has not been observed; thus an indictment

(t) Dyer, 28. 2 Hale, 178. (x) Heydon's case, 4 Co. 41. Keil. 100. 4 Co. 41. Str. 901. Godbolt, 65. 66. Dyer, 69.

(u) 2 Hale, 178. 2 Haw. (y) East. P. C. 346. c. 23. s. 88. Cro. Eliz. 739. (z) 2 Hale, 178.

against A. alleged, that at such a time and place, upon one B. he made an assault, *and* beat the said B., without saying, and *then and there*; yet it was holden to be sufficient, and it was said that the day and place named in the beginning extended to all the ensuing acts (a). So it has been holden, that in an indictment it would be sufficient to say, *quod primo M. intravit et ipsum dissecisivit*, without the *adtunc et ibidem* (b).

But where, in order to constitute the offence, connected acts must be shewn to have been done *at the same time*, a mere repetition of the same day, year, and place, would not be sufficient, for it would not expressly appear that the acts were done at the same time. So that an indictment averring that A. on such a day, at such a place, feloniously assaulted B. with intent to spoil her clothes, and that A. did, on the said day, at the said place, spoil the said clothes, is vicious, because it does not shew that the felonious assault and spoiling of the clothes were continuous (c).

In the case of homicide, the day of the stroke, as well as of the death, should be expressed; the former because the escheat and forfeiture of lands relate to it, the latter, because it should appear that the death was within the day and year after the stroke (d).

Where the time is material, as of the death, in case of homicide (e) or where the time for prosecution is limited, as under the stat. 7 W. 3. c. 3. which enacts, that no prosecution shall be had for certain treasons therein mentioned, unless the bill of indictment be found within

(a) 2 Hale, 178.

(d) 2 Hale, 179.

(b) Baude's case, Cro. J. 41.
Dyer, 69.

(e) 2 Haw. c. 23. s. 90. 2
Hale, 179. 186.

(c) William's case, Leach.
597. under the st. 6 G. 1. c. 23.

three years after the offence committed; the time, as averred in the indictment, should appear to be within the limit; but it is not necessary expressly to aver that the death happened, or that the offence was committed, within the temporal limit (*f*).

In general it seems that an uncertainty in the day or year, will vitiate the indictment.

A. was indicted for that on the 1st & 2nd days of May, he made an assault upon B. and a certain cloak of the said B. then and there found, feloniously took, &c. and the indictment was holden to be vicious, because two days had been before mentioned (*g*). So an indictment for the killing of B. on the feast of St. Peter, is bad, since there are two feast days of St Peter, each of which is distinguished by an addition (*h*).

So if an indictment lay the offence to have been committed on an (*i*) impossible day, as if it lay it on a future day (*k*), or lay one and the same offence on different days, (*l*), or on such a day as makes the indictment repugnant (*m*) to itself, it is void, and no defect of this nature can be aided by verdict.

The word *until* is capable of either an exclusive or inclusive sense: in the case of *the King v. Stephens and Agnew*, the information alleged, that the defendants held

(*f*) 5 East, 259. Where in delivering the judgment of the court, Lord Ellenborough held, that in an appeal it was unnecessary to aver, that the party died within a year and a day after the stroke, if the fact appeared from a comparison of of dates.

(*g*) 2 Hale, 178.

(*h*) Ibid.

(*i*) Moore, 555. *R. v. Fearnly*, 1 T. R. 316. 2 Haw. c. 25. s. 77.

(*k*) 2 Haw. c. 25. s. 77. Rastal, 263.

(*l*) 2 Haw. c. 25. s. 77. 2 H. 7. 7.

(*m*) 2 Haw. c. 25. s. 77.

certain offices in the service of the East India Company, from, &c. *until* the 29th of November, 1795, and afterwards charged that each of the defendants, *whilst he held and exercised the said office* as aforesaid, did, to wit, on the 29th of November, 1795, receive a certain present, &c. And it was holden upon motion in arrest of judgment, that the word *until* was capable of an inclusive meaning, and that it appeared from the context to have been intended in that sense (n).

But though time must always be alleged in pleading (o) every material fact, it is never necessary to prove the allegation, unless time be a material ingredient in the

(n) 5 East, 244. See also the stat. 40 G. 3. c. 50. which enacts, that persons entering any forest, &c. in the night, i. e. between the hours of eight at night, and six in the morning, from the first of October to the first of February, or between the hours of ten at night, and four in the morning, from the first of February to the first of October, having any gun, &c. to kill game, &c. shall be deemed rogues and vagabonds, &c.

It clearly was not the intention of the legislature to exempt persons committing those acts on the first of Feb. and on the 1st of Oct. and therefore either *to* or *from* must have been used inclusively; it must however, be acknowledged,

that this enactment is loosely penned. So the word *to*, when applied to time, may have either an *inclusive* or *exclusive* signification. Per. Ld. Ellenborough, 5 East, 255, citing Hale, Hist. 165. Ayliffe's Parergon, 152. In *Nicholls v. Ramsel*, 2 Mod. 280, it was holden, that a release of all trespasses *usque ad* the 24th of April, did not include that day. And a bond dated the 26th of April, is not released by a release of all demands till the 26th. *Newmann v. Beamond*, Owen, 50. See *R. v. Navestock*, Burr. S. C. 719. also *R. v. Syderstone*, Cald. 19. 4 Burn. 235. *Beadlam v. Shiplam*, 1 T. R. 490.

(o) 5 T. R. 620. *R. v. Holland*.

offence. So that an overt act of treason may be proved to have been committed on a day different from that laid in the indictment (*p*).

And therefore upon a second indictment, the defendant may, by proper averments, shew that he has been already acquitted of that offence upon the first, though the two indictments allege the offence to have been committed on different days; for it would be hard indeed if the prosecutor might vary from the day laid in the indictment for the purpose of conviction, and the prisoner could not do the same in order to shew a previous acquittal (*q*).

II. *Averment of Place.*

The necessity of shewing that the offence was committed within the local jurisdiction of those who have power to inquire, has already been considered; and it is essential to shew that every material fact, which is issuable and triable, was done at some particular vill (*r*), or hamlet, or place, within the county or other division (*s*), not only for the sake of shewing the authority to inquire, but also for the purpose of procuring a jury to be returned from the neighbourhood (*t*).

(*p*) Foster, 8. See also Lord Balmerino's case, 9 St. Tr. 587. 3 Ins. 230. Syer's case, Keb. 16. 1 Hale, 361. 2 Hale, 179. 291. 2 Ins. 318. 5 T. R. 620.

(*q*) 2 Ins. 318. 2 Hale, 179. 3 Ins. 230.

(*r*) Bac. Ab. Ind. 562. 2 Hale, 180. See *R. v. Goldsmith*, 3 Campb. 77.

(*s*) Chap. 1. and see Wigge's

case, 4 Co. 45. where an indictment, before the coroner of the household, &c. was quashed, because it laid the stroke and the death at S. in the county of Middlesex, without alleging that S. was within the verge, i. e. within 12 miles of the lodging of the king, in his court.

(*t*) 5 T. R. 620.

In appeals of death, the statute of Gloucester directs that the offence shall be laid within the proper vill; but since the statute is directory, it does not seem to be absolutely essential to lay it within a vill (u).

In other cases a material fact may be laid at any place, from the visne or neighbourhood of which a jury can be returned.

A venire may be awarded to any place which is of so limited a compass that all who live in and near it, may reasonably be presumed to have some knowledge of the persons resident, and facts done, within its limits (v).

(u) St. of Glou. c. 9. 2 Haw. c. 23. s. 92.

(v) Ibid. A visne may come from a town. 2 Haw. c. 23. s. 92. a ward, Yelv. 159. 1 Sid. 178. Cro. J. 222. parish, 6 Co. 14. Burr. 333: hamlet, 2 Haw. c. 23. s. 92. 6 Co. 14. burg, Cro. Eliz. 866. manor, Co. Litt. 125. 1 Sid. 226. castle, 2. R. Ab. 612. 613. 614. Co. Litt. 125. forest, Co. Litt. 125. 2 Roll. Ab. 618. or any place known out of a town. 2 Ins. 319. Cro. Eliz. 200. And if the sheriff returned that there was no such vill or parish, then the practice was to award the venire *de corpore commitatus*, So a visne may come *de vicineto civitatis*, 2 Haw. c. 23. s. 92. 2 Roll. Ab. 622, 623. Cro. J. 307, 308. 2 Hale, 262.

But not from London, both on account of its great extent and because it has been the constant practice to shew the parish and ward 2 Haw. c. 23. s. 92; and the offence may be laid in a parish without the ward. But it should be laid either in a parish, or in a ward, 7 H. 6. 36. Burr. 333. 9 Co. 66. 2 Haw. c. 25. s. 283. Harris's case, Leach, 928. In this last case judgment was arrested, because the offence was alleged to have been committed at the Guildhall of the city of London.

So a visne cannot come from a liberty, for it is a thing incorporeal, and not a place, 1 Sid. 326.: nor from the scite of a manor, because it does not signify a place but the limits of a place, 2 Roll. Ab. 618.; nor from a weald,

Whenever the place is generally alleged, the law will intend it to be a vill, unless the contrary appear upon the record (*x*). If, therefore, a fact done in a vill, within a parish which contains several vills, be alleged to have been done at the parish generally, it will be intended, that the parish contains but one vill; and therefore to take advantage of the defect, the defendant must plead in abatement (*y*).

If there be no such vill or place within the county, the defendant may plead in abatement (*z*); but the indictment or appeal in such a case is void, and so is all process founded upon it, by the express provision of the stat. 7 H. 5. 9 H. 5. c. 1. and 18 H. 6. c. 12.

It must be shewn that the vill or place is within the county (*a*).

But if the place be alleged in the body of the indictment, without the county, the indictment will still be good, if the place be referred to the county in the margent by the words, "in the county aforesaid (*b*)."

In civil pleadings, the place laid in the body of the declaration will be referred to the county laid in the margent, without the aid of any particular words; but in indictments it is otherwise, and a mere allegation of the place, without reference to a county previously men-

1 Sid. 88. 2 Roll. Ab, 617.

tamen qu. and *vide* 2 Haw.

c. 23. s. 93.

(*x*) Salk. 59. 8 East, 174.

1 Inst. 125. b. 2 Haw. c. 23.

s. 92. Burr. 333.

(*y*) 2 Haw. c. 23. s. 92.

Salk. 69.

(*z*) 2 Haw. c. 23. s. 92.

Cro. Eliz. 200. 35.

(*a*) 2 Hale, 180, Co. 84.

(*b*) Com. Dig. Ind. G. 2.

2 Hale, 180. 3 P. Wms. 439.

tioned, either in the indictment or the margin, will be vicious (c).

If the offence be laid to have been committed in a city which is a county of itself, but the jurisdiction of the latter is not co-extensive with the former, the offence should be laid within both (d).

It is a general rule, that a defective venue is not aided by verdict, and may be excepted on demurrer, or by motion in arrest of judgment (e). And any uncertainty in the place or county, will avoid the indictment, as if an act be laid at such a place, in *comitatu prædicto*, two counties having been mentioned before (f). And the case is the same, though one of the counties be mentioned in the margin only (g).

So where the defendant is described as late of W. and the offence is laid in the parish aforesaid. (h).

So where the offence is laid at the town aforesaid, no town having been previously mentioned (i).

In an indictment, though it is unnecessary to aver a mere conclusion of law with either time or place, yet if it be averred with time and place, and improperly, the indictment will be defective.

If therefore, the stroke be laid at A. and the death at B. the indictment averring, in conclusion, that the defendant feloniously murdered the said C. D. at A. is vi-

(c) 3 P. Wms. 439. 2 Hale, 165, 166. 2 Haw. c. 25. s. 128. Cro. Eliz. 137. Leuthal's case, ib. 606. Child's case, ib. 750. 101, 184, 618. 6 Sid. 345 3 Wils. 340.

(d) *R. v. Bruce*, Andr. 62.

(e) 1 Roll. Ab. 781. 5 T. R. 162.

(f) 2 Hale, 180. *Wingfield's case*, Cro. Eliz. 739.

(g) Cro. Eliz. 739. 2 Hale, 180. aliter in civil cases. 3 Wils. 340.

(h) 5 T. R. 162.

(i) 2 Haw. c. 25, s. 83. Cro.

Car. 465.

cious, for the murder was completed at B. by the death of the party there (*k*).

The words *from* and *unto*, when applied to place, are construed in an exclusive sense (*l*). Thus from Hatley *unto* (*m*) Gamlingay, has been holden to exclude Gamlingay; so the words to and from the town of Battel (*n*), were holden to exclude Battel itself.

But though the place must be precisely laid in the indictment, it is not necessary to prove the offence to have been committed there; but it is sufficient to shew by evidence, that it was committed at any other place in the same county; and it is, in general, unnecessary to prove an offence to have been committed in any particular place, unless the place itself be of the essence of the crime, as in an indictment for striking in a church yard, or in indictments, where the situation of a house or road is specially described, as in an indictment for burglary or for the non-repair of an highway (*o*), or for a nuisance near an high road and dwelling-house (*p*).

The rules relating to the averment of time, apply, for the most part, to the averment of place: and where the time must be repeated upon the allegation of subsequent acts, the repetition of place is generally also necessary (*q*).

The allegation of any personal disqualification, necessary to bring the defendant within the purview of a penal statute, need not, in general, be pleaded with either time or place. Thus, under the statute which

(*k*) 2 Haw. c. 25.

(*l*) 2 Roll. Ab. 81.

(*m*) Leach, 596. *R. v. Gamlingay*, 3 T. R. 513.

(*n*) Burr. 376. Leach, 597.

(*o*) See tit. description of

persons and things connected with the offence.

(*p*) *R. v. White*, Burr. 333.

(*q*) 2 Hale, 180. per Buller,

J. 5 T. R. 620.

made it treason for a person born within the realm and in popish orders, to remain here, it has been holden, that the indictment need not shew any venue (r) for the birth or denization. So under the stat. 1 J. 1. c. 7. in averring that the wife was living at the time of attempting to contract the second marriage, it is sufficient to allege that she was *then* living (s) without laying any venue. So in barretry a venue is unnecessary, for the offence is not confined to any particular place, and the offender is to be tried by a jury *de corpore comitatus* (t). And, in general, where the offence consists in a bare nonfeasance, it need not be alleged to have been committed any where, as where the defendant is indicted for not coming to church (u). In the statement of mere introductory circumstances, a venue seems to be unnecessary (x).

(r) 2 Haw. c. 25. s. 84. 112.

(s) I have heard the objection taken twice and as often overruled.

(t) 2 Hale. 180. Qu. and see *Mann's case*, 3 Car. B. R.

(u) And, 139. Hob. 251.

2 Leon. 167. 1 Haw. c. 10.

(x) *R. v. Crossley*, 7 T. R. 315.

CHAP. V.

Of the substantial Description of the Offence in the Body of the Indictment.

THE general rule has long been established, that no person can be indicted but for some specific act or omission, or punished, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record. Before this important part of the subject is resolved into its elementary divisions, it may be proper, briefly, to notice the principal reasons, on the ground of which the law exacts a certain particular description of the offence, for these, it is evident, supply the true test by which the sufficiency of any criminal charge is to be ascertained.

It is necessary then to specify, on the face of the indictment, the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence.

1st. In order to *identify* the charge, least the grand jury should find a bill for one offence, and the defendant be put upon his trial, in chief, for another, without any authority. And this is further necessary (a).

2ndly. That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds: the offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the *same offence* (b).

(a) Staunf. 181.

(b) Ib.

3rdly. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case (c).

4thly. To enable the defendant to prepare for his defence (d) in particular cases, and to plead in all (e), or if he prefer it, to submit to the court by demurrer, whether the facts alleged, (supposing them to be true), so support the conclusion in law, as to render it necessary for him to make any answer to the charge.

5thly. Finally and chiefly, to enable the court looking at the record after conviction, to decide whether the facts charged, are sufficient to support a conviction of the particular crime (f), and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender (g).

Many instances are to be found in the older reports, of indictments, which have been supported, though they charged the defendants, in general terms, with being *heretics, traitors, insidiatores viarum et depopulatores agrorum*. (h). For the *insidiatio viarum* and *depopulatio agrorum*, were considered as hostile acts; and the offenders convicted upon such indictments, were for that reason, denied the benefit of clergy, notwithstanding the stat. 25 E. 3. c. 4. *pro clero* (i). But upon complaint made by the clergy, the stat. 4 H. 4. c. 2. was made, which enacts, "that these words shall no more be put into indictments, nor if they be, shall have such effect as to take from the prisoners indicted the benefit of clergy."

(c) Staunf. 181:

(g) Ibid. 5 T. R. 623.

(d) *R. v. Holland*, 5 T. R. 623. Fost. 194.

(h) 3 Ins. 41. 11 Co. 19. 2 Haw. c. 25. s. 59. 1 Hale

(e) 3 Ins. 41.

571. 2 Hale, 333.

(f) Cowp. 672.

(i) 2 Hale, 338.

But notwithstanding particular instances to the contrary, such loose and general pleading seems to have been at all times inconsistent with the general policy and true spirit of the common law; and in very early times, exceptions, upon this ground, were both taken and allowed. Thus, in the reign of Edward III. indictments, which charged the defendants, generally, with being common misfeasors, or common thieves, without shewing the particulars, were holden to be insufficient (*k*). So, indictments have been holden to be defective, which barely charged the defendant with being a common defamer, vexer, and oppressor (*l*), a common disturber of the public peace (*m*), a common deceiver (*n*), a common forestaller (*o*).

The only instances in which general pleading seems to be allowable, are exceptions from the necessity of the case, where the offence is made up of a number of minute acts, which cannot be enumerated upon the record, without great prolixity and the danger of variance (*p*).

Thus in an indictment against a common scold, it is sufficient to aver that she is *a common scold*; and in an indictment for barrettry, it may be averred, generally, that the defendant is a *common barretor*. (*q*).

So, according to Lord Hale, an indictment, charging the defendant to be *noctivagus*, is good (*r*).

With respect to the degree of certainty and minuteness,

(*k*) Staun. b. 2. c. 30.
2 Hale, 182.

(*l*) 1 Roll. 79. Str. 699.

(*m*) 2 Haw. c. 25. s. 59.

(*n*) 6 Mod. 11.

(*o*) 2 Haw. c. 25. s. 59.

(*p*) 2 Haw. c. 25. s. 59.
6 Mod. 311. Str. 1246. 2 Burr.
1233.

(*q*) But it is usual for the prosecutor (before the trial) to give the defendant a written note of the particulars intended to be relied upon. 2 Haw. c. 25. s. 59.

(*r*) 2 Hale, 182. The keeping of a gaming-house may be described generally, because it

Substantial Description.—General Rules. 71

in averring the facts and circumstances of any particular offence, it may be proper to premise the following authorities. Lord Hale says (*s*), "An indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact, and its nature."

In the case of the *King v. Horne* (*t*), Lord Chief Justice De Grey, in delivering the opinion of the judges, observed, "The charge must contain such a description of the offence, that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty, or not guilty, upon the premises delivered to them, and that the court may see such a definite crime, that they may apply the punishment which the law prescribes. This, I take to be what is meant by the different degrees of certainty mentioned in the books; and it consists of two parts; the *matter* to be charged, and the *manner* of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage; and therefore, in the instance for a prosecution for perjury, it is necessary to set out the oath, as an oath taken in a judicial proceeding, and before proper persons, in order to see whether it is an oath which the court had jurisdiction to administer. In the prosecution of a constable, for not serving the office, it is necessary to set out the mode of his election; because, if he is not legally elected, he cannot be guilty of a crime in not serving the office. Where the circumstances go to constitute the crime, they must be set out. Where the crime is a crime independently of such circum-

consists of a multiplicity of facts,
per *Grose, J. R. v. Mason*
1 Leach, C. C. p. 548.

(*s*) 2 Hale, 169.
(*t*) Cowp. 672.

stances, they may aggravate, but do not contribute to make the offence."

In the case of the *King v. Hollond*, (u), the court held that three things ought to concur in every criminal proceeding: 1st. That the party accused should be apprized of the charge he is to defend. 2dly. That the court may know what judgment is to be pronounced according to law. 3dly. That posterity may know what law is to be derived from the record. To which may be added: 4thly. That the accused may be enabled to plead his conviction or acquittal to another indictment, for the same offence. One count of the indictment, in the last case, alleged that the defendant, and other persons in office, "did not commence and prosecute the war against Tippoo Sultaun, with all possible vigour and decision;" and this count the court held to be vicious, because it did not sufficiently apprise the defendant of that which was intended to be proved against him.

In the case of the *King v. Stevens (v) and Agnew*, Lord Ellenborough, C. J. in delivering the judgment of the court, said, "every indictment, or information, ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed, than such as are in ordinary use."

On the other hand, it is unnecessary, even in an indictment for treason, to detail the minutiae of those circumstances intended to be proved against the defendant. It is sufficient that the charge be reduced to a reasonable degree of certainty, so that the defendant may be apprized of the nature of it, and prepared to give an answer to it (x).

(u) 5 T. R. 623.

(x) Fost. 194.

(v) 5 East, 258.

Substantial Description.—General Rules. 73

The substantial description of the offence, will be considered under the following divisions ;

1. Of alleging the *nature and degree of the offence* against one or more.

2. Of setting forth the *means and manner* of committing the offence, with the circumstances *immediately* connected therewith.

3. Of alleging circumstances *collateral* to the principal act, but which are essential to the offence.

4. Of alleging the defendant's *intention*.

5. Of the special description of *persons, places, and things*, connected with the offence, with names, quantity, number, and value.

CHAP. VI.

Of alleging the Nature and Degree of the Offence in technical Terms.

I. *As against the Principal in the first Degree, p. 69.*

II. *Against Principals in the second Degree, p. 75.*

1. **THE** law distributes crimes into three great classes, —treasons, felonies, and misdemeanors, inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is therefore one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him, that he may be excluded from those which the law withholds, and that the court may be authorized, after conviction, to inflict the appropriate measure of punishment. This is done, by charging the treasonable act to have been committed *proditorie*, and the felonious act to have been done *felonice* (a); these words are absolutely essential to the description of these offences; and the intention to charge a bare misdemeanor, is ascertained by the omission of both the words descriptive of treason and felony; for it seems to be clear, that no offence, as described in any indictment, can amount to more than a misdemeanor (b), if it be not laid to have been committed either *proditorie* or *felonice* (c).

(a) Staunf. 96. a. 2 Haw. c. 25. s. 55. crime below the degree of felony.

(b) Note, the term *misdemeanor* is in general used to signify, in these pages, a (c) 2 Hale, 172. 2 Haw. c. 25. s. 55. 3 Ins. 15.

Next, in the description of the species of treason, felony, or misdemeanor, charged upon the defendant, it is frequently necessary to make use of technical and appropriate words, which are either generally descriptive of the offence itself, or of the particular facts connected with it. A strict adherence to such words, may, in some cases, appear too nice and critical to serve the end of justice; yet it seems founded upon many strong and substantial reasons.

For instance, by successive decisions, the legal value and weight of a term or phrase of art is ascertained; and, should a doubt arise as to its meaning, reference for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent would be wholly lost.

In all indictments for treason, the offence must be laid to have been committed *traitorously*. But if the treason itself be laid to have been so committed, whether it consist in compassing and imagining the king's death, or otherwise, it is not necessary to allege every overt act to have been traitorously committed (d). In the case of *treason* against the king's person, the indictment, in conclusion, should allege the offence to have been committed against the defendant's duty of *natural allegiance*, if he be a natural born subject, or simply against his duty of allegiance, if he be an alien; but the word *natural*, does not appear to be essential in the first instance, and would probably be fatal in the latter, if it turned out that the defendant was an alien (e).

(d) Cranbourn's case, 4 St. 1 Hale, 59. 77. 92. Dyer, 145. Tr. 701. Salk. 633. East, P. C. Calvin's case, 7 Co. 6. b. 1 116. Haw. c. 17. s. 5. 6 St. Tr. 58,

(e) Fost. 186. 4 St. Tr. Francia's case. 687, 9. Salk. 633. 4 Mod. 163.

In indictments for inferior treasons, such as relate to the coin, &c. it is usual to allege the offence to have been *feloniously* as well as *traitorously* committed; but this does not appear to be essential. So petit treason is usually alleged to have been *feloniously* as well as *traitorously* committed (*f*), and the indictment, in conclusion, alleges that the defendant did traitorously and feloniously kill and *murder*; in which case, the defendant, though acquitted of the treason, may nevertheless be convicted of the felony and murder (*g*).

It has already been observed, that every felony must be alleged to have been committed *feloniously*; and in indictments for particular felonies, technical and appropriate words are frequently essential to the description of the offence. Thus, in an indictment for murder, it is essential to state, as a conclusion from the facts previously averred, that the said defendant, him, the said C. D. in manner and form aforesaid, feloniously did kill and *murder* (*h*); a term of art, which can in no case be dispensed with. So it must also be alleged, that the offence was committed of the defendant's *malice aforethought*; words, which cannot be supplied by the aid of any other. And if any of these terms be omitted, or if the defendant be merely charged with killing and slaying the deceased, the offence will amount to no more than manslaughter (*i*).

(*f*) Fost. 329.

(*g*) Fost. 328.

(*h*) 1 Hale, 450. 466. 4 Bl. Comm. 307. Yel. 205. The term was originally introduced, in order to exclude the offender from his clergy. *R. v. Clerk*, Salk. 377, and is not essential

to an indictment for manslaughter.

(*i*) 1 Hale, 450. 466. East, P. C. 345. A killing by misadventure, or chance medley, is described to have been done "casually and by misfortune, and against the will of the defendant."

Where the death arises from any wounding, beating, or bruising, it has been said, that the word struck (*k*) is essential, and that the wound, or bruise, must be alleged to have been *mortal*. And whatever doubt may rest upon the necessity of the first allegation, it would not be prudent, at all events, to omit it where it is applicable; and as to the second (*l*), it has been holden, that its omission cannot be supplied by the averment, which is in all cases necessary, that the party died of the stroke (*m*).

In appeals and indictments of mayhem, the words *feloniously*, and did *maim*, are essential (*n*).

In appeals and indictments of rape, the words *feloniously ravished* are essential, and the word *rapuit* is not supplied by the words *carnaliter cognovit* (*o*); and it seems that the latter words are also essential in indictments (*p*), though the contrary has been ruled in the case of an appeal (*q*).

The usual course, in an indictment for rape, is to aver that it was committed *against the will* of the female, and therefore it would not be safe to omit the averment. In an indictment for an unnatural crime, the descriptive words of the statute, taking (*r*) away clergy, must be used; and it is not sufficient to say *contra naturæ ordinem rem habuit veneream et carnaliter cognovit* (*s*).

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| <p>(<i>k</i>) 2 Hale, 184. 1 Buls. 124.
2 Ins. 319. 2 Haw. c. 23. s. 82.
Cro. J. 635. 5 Co. 122.</p> | <p>(<i>p</i>) 1 Hale, 632. 3 Ins. 60.
Co. Lit. 137. 2 Ins. 180.</p> |
| <p>(<i>l</i>) Lad's case, Leach, 112.</p> | <p>(<i>q</i>) 11 H. 4. 13. 2 Haw. c. 23.
s. 79. Summ. 187. Staun. 81.</p> |
| <p>(<i>m</i>) 2 Hale, 186. 1 Haw. c.
23. s. 82. Kel. 125.</p> | <p>(<i>r</i>) 5 Eliz. c. 17. 3 & 4 W.
& M. c. 9. s. 2. Fost. 424. Co.
Ent. 351. 3 Ins. 59. 1 Haw.
c. 4. s. 2.</p> |
| <p>(<i>n</i>) 3 Ins. 118. 2 Haw. c. 23.
s. 15, 16, &c. 2 Haw. c. 25.
s. 55.</p> | <p>(<i>s</i>) East, P. C. 480. 3 Ins.
59.</p> |
| <p>(<i>o</i>) 1 Hale, 628. 2 Hale, 184.
1 Ins. 190. 2 Ins. 180.</p> | |

In an indictment for *burglary*, the essential words are *feloniously* and *burglariously broke and entered the dwelling-house*, in the *night time*; and the felony intended to be committed, or actually perpetrated, must also be stated in technical terms (*t*). So in case of simple larciny, the words *feloniously took and carried away the goods* (*u*), or *took and led away the cattle*, are essential.

In an indictment (*x*) for robbery from the person, the words *feloniously, violently* (*y*), and *against the will*, are essential; and it is usual, though it seems to be unnecessary, to allege a *putting in fear*. Piracy must be alleged to have been done *feloniously* and *piratically* (*z*).

So, in case of misdemeanors, technical words are frequently necessary.

Thus, a *common barretor*, and a *common scold* (*a*), must be charged as such; and in an indictment for maintenance, the word *manutenuit* should be inserted, and the word *riot* seems to be used in all indictments for that offence (*b*).

In an indictment for a riot, it is usual to allege it to have been committed in *terrorem populi* (*c*), but this does not appear to be essential, if it be alleged that the defendants assembled riotously and committed an unlawful act (*d*).

It has been said, that where the fact, laid in an indict-

(*t*) 1 Hale, 549.

(*u*) 1 Hale, 504. 2 Hale, 184.

And it has been said that for stealing an horse, it should be *cepit et abduxit*, for stealing sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions.

(*x*) 1 Hale, 534. Fost. 128.
3 Ins. 68.

(*y*) Qu. *et vide* Smith's case,

East's F. C. 783. in which it was holden, that *violenter* is not an essential term of art.

(*z*) 1 Haw. c. 37. s. 6. 10.

(*a*) Com. Dig. Ind. G. 6.
Mod. Ca. 11.

(*b*) R. v. Johnson and others,
Wils. 325.

(*c*) 1 Haw. c. 65. s. 5.

(*d*) See Lord Holt's opinion,
R. v. Soley. 11 Mod. 115.

ment, appears to be unlawful, it is unnecessary to allege it to have been *unlawfully* done (*e*). In truth, the averment is in no case essential, unless it be part of the description of the offence, as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word *illicite* cannot render it indictable; and the same observation is applicable to the terms wrongfully, unjustly, wickedly, wilfully, corruptly, to the evil example, falsely, maliciously, and such like; which are unnecessary, if they are not to be found in the very definition of the offence, either at common law, or in the purview of a statute; and at common law it seldom happens that one of these expressions may not be supplied by an equivalent one. Thus, though it is usual to allege that the party *falsely* forged and counterfeited, it is enough to allege that he forged, because the word implies a false making; and in indictments for libels, it is sufficient either to use the word *falsely* or *maliciously* (*f*), or an equivalent epithet.

When the indictment is framed upon the purview of some statute, it may be laid down as a general rule, that all the epithets of manner contained in the statute, should be (*g*) averred upon the record. In some instances, indeed, indictments have been holden to be sufficient which did not strictly pursue the words of the statute on which they were founded (*h*); but it is at all times imprudent to omit any part of the description contained in the statute, since such an omission will in general be fatal. Thus an

(*e*) 2 Roll. Ab. 82.

(*h*) Fost. 130. 1 And. 195.

(*f*) Sty. 392. 2 Will. Saun. 242.

R. v. Hall and Crutchfield,
East, P. C. 895, 896.

(*g*) 2 Haw. c. 25. s. 110.
Kel. 8. Fost. 424.

indictment for perjury, under the statute of Elizabeth, for want of the word *wilful*, which is used in the act, was holden to be vicious (*i*), though in an indictment for perjury, at common law, the word would not be essential. In an indictment for perjury at common law, the term *wilfully* is included in the terms falsely, maliciously, wickedly, and corruptly. The necessity of adhering strictly to the terms or phrases used by a penal statute, will hereafter be more fully considered; for the present it may suffice to observe, that in framing an indictment, it is in all cases prudent and advisable to make use of the same language which the legislature has thought fit to select and adopt.

In every indictment, whether technical words be essential or not, the act of the defendant must be directly and plainly, and singly charged; it is insufficient, therefore, to allege the offence, by way of recital, prefacing the description with the words, “for that whereas” (*k*). So it is to allege that A. discharged a gun at B. giving him a mortal wound, without directly averring that he struck B. has been holden to be insufficient (*l*). So it is improper to allege an offence in the disjunctive, as by averring that the defendant forged *or* caused to be forged, for the judgments are different (*m*); and the indictment would be defective, even though the judgments for the two offences, disjunctively stated, be the same; as if the indictment allege that the defendant *verberavit vel verberari causavit* (*n*); and the

(*i*) Leach, 82.

Buls. 124. *tamen qu. et vid.*

(*k*) 2 Haw. c. 25, s. 60.

Ld. Ray. 1169.

Salk. 371. 3 Mod. 53. Lord
Ray. 1363. Burr. 400.

(*m*) 5 Mod. 137. *R. v. Stock-*
er, Salk. 342, 371. 8 Mod.

(*l*) Long's case, 5 Co. 122.

32. Str. 747, 900.

(*n*) 5 Mod. 137.

defect would be fatal, either upon demurrer, or upon motion in arrest of judgment (o).

2ndly. *Against principals in the second degree.*

Where several are concerned in the committing of the same crime, or in procuring it to be committed, they are either *principals* or *accessories before the fact*.

It will be considered here, how the offence ought to be charged against those whom the law considers to be *principals*.

In treason, petit larciny, and misdemeanors below felony, the distinction between principals and accessories is not admitted, and all advisers, contrivers, and procurers, are equally principals with those who commit the offence, though they be absent at the time of its commission; and in such cases it seems to be a general rule, that all such principals may be charged to have committed the offence jointly, provided the nature of the offence admit of such participation (p). But where a person becomes a traitor, by harbouring and receiving another who has committed treason, the indictment must be specially framed for the receipt, and not for the principal treason (q).

And in general, where A. and B. are present, and A. commits an offence in which B. aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first de-

(o) See Index, tit. Defective Indict.

(p) Vide supra, tit. Joinder, and see 6 Mod. 289. Where the offence procured to be committed is several in its nature, the procurer must be specially indicted for the subornation.

An indictment for a trespass has been held to be sufficient, although in some parts of the charge, the defendant was represented to be an accessory only. *R. v. Tracy*, 6 Mod. 31.

(q) Fost. 345.

gree (r), for the act of one is the act of the other (s). And upon such an indictment, B. who was present aiding and abetting, may be convicted, though A. is acquitted (t). So A. and B. if present aiding and abetting, may be convicted, though C., a person not named in the indictment, committed the act (u). Again, if an indictment for murder charge that A. gave the mortal stroke, and that B. was present aiding and abetting, both A. and B. may be convicted, though it turn out that B. struck the blow, and that A. was present aiding and abetting (x). To go one step further, upon a similar indictment charging A. as a principal in the first degree, and B. as present aiding and abetting, B. may be convicted though A. be acquitted. This was expressly decided in the case of Wallis (y), who was tried before Lord Hale, C. J. who observed, "who actually did the murder is not material; the matter is, that a murder was committed, and the other is but a circumstance; and all are principals in this case; therefore if a murder be proved it is well enough."

In a much later case (z) the same point arose, and the majority of the judges were of opinion, that the conviction was proper; but it appears that the judges were not unanimous, and the prisoner was not executed.

(r) Fost. 351, 425. 2 Haw. c. 23. s. 76. 2 Hale, 344.

(s) 2 Haw. c. 23. s. 76. R. v. *Young and others*, 3 T. R. 105.

(t) Fost. 351. 1 Hale, 437, 463. 2 Hale, 185, 292, 344, 5. 2 Haw. c. 46. s. 195. 9 Co. 67.

(u) R. v. *Borthwick*, Doug. 207. Kel. 109. Saund. 109.

(x) *Banson v. Offley*, 2 Show. 510. 3 Mod. 121. Fost. 351. 1 Hale, 437, 463. 2 Hale, 344, 5.

(y) Salk. 334. 1 Haw. c. 31. s. 46, 47.

(z) R. v. *Taylor and Shaw*, Leach, 398.

If a statute oust a person who does a particular act of his clergy, and be silent as to aiders and abettors, the indictment will not oust an offender of his clergy unless it allege that he did the act; and it will be insufficient to describe him as being present aiding and abetting. Thus, if an indictment under the statute of stabbing, allege that A. made the thrust, and that B. and C. were present aiding and abetting, if it turn out that A. gave not the stroke, but B., and that A. and C. were aiding and abetting, not only A. and C. who gave not the stroke, would have their clergy, but B. also; because though the case of B. is within the statute, yet as to him the indictment brings him *not within the statute* (a). “And therefore,” says

(a) 2 Hale, 344. AL. 43. lawfully convicted, shall be
Styles, 86. Salk. 542. 1 Hale, adjudged to be guilty of felony,
468. 2 Ld. Ray. 842. See and shall suffer death without
the very learned and elaborate benefit of clergy,” ousted Sims
argument of Mr. Justice Foster, of his clergy. Upon the first
in the case of Midwinter and consideration of this case, Ld.
Sims, Fost. 415. The prison- C. Baron Parker and Mr. J.
ers were indicted on the stat. Burnet, were of opinion, that
9 G. 1. c. 22. for feloniously the prisoner was ousted; Mr.
killing a mare. It appeared in J. Foster differed from them,
evidence, that Sims held the and Justices Wright and De-
mare by means of a girdle nison inclined to the opinion of
buckled round her neck, whilst Mr. J. Foster; but they after-
Midwinter, with a large sharp wards agreed with the Chief
hook, called a bill, inflicted Baron and Mr. J. Burnet, and
a deep wound in her belly, of the same construction of the
which she died. The doubt statute was adopted by the
was, whether the words of the judges in the coalheaver’s case,
act, “if any person shall un- Leach, 76. Mr. Justice Foster’s
lawfully and maliciously kill, main argument is derived from
&c. any cattle, &c. every per- a supposed analogy of the case
son so offending, being thereof to those under the stabbing act,

Lord Hale, “the case differs from an indictment for murder, where, though it be laid that A. gave the stroke and that B. was present aiding and abetting, yet, if upon

Al. 43. Styles, 86. of secret larceny from the person, 1 Hale, 529. and of robbing in a dwelling house, under the stat. 39 Eliz. c. 15. *R. v. Evans and Finch*, Cro. Car. 473. 1 Hale, 526, 528, 537; in all of which cases it had been decided, that a mere aider and abettor, who did not come within the express words of the statute, was not ousted of his clergy. But, with great veneration for the talents of so distinguished a proficient in criminal law, I venture to observe, that in those cases the plain literal construction of the several acts was adhered to, and not violated, by confining their operation to principals in the first degree, to the exclusion of *aiders and abettors*; but it seems impossible to conceive, by what rule of construction the descriptive words of this or any statute can apply to an aider and abettor for one purpose and not for another, that is, so far as to render him a principal felon, and yet not so far as to subject him to the punishment in the

same breath, denounced against such a felon. For it was admitted on all hands, *that an aider-and abettor was a principal felon under the act*. And it would introduce a most mischievous degree of subtlety into legal construction, so to interpret the legislative definition of an offence, as to hold that a person falling within that description, should not be subject to the penalty of the statute; on the other hand, it is no strained argument to suppose that the legislature, in framing the statute, considered, that by the operation of the common rule of construction, an aider and abettor would be treated as a principal offender, and consequently intended by such words to subject him to the penalties of the statute.

At the Old Bailey Sessions, June, 1813, upon the trial of Brady and others, for forging and uttering a check, Mr. Baron Graham said, “it has frequently been held, that what would amount to a constructive presence at common law, will

evidence it appear that B. gave the stroke, and A. was abetting, both shall be convict of murder; for both are equally murderers, and the indictment is true as to both; viz. that of their malice aforethought they did kill and murder. But it has been decided, that where a statute creates a new felony, enacting, that all who are guilty of

not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at *some little distance in the street*; it was objected that the latter was not liable as a principal. I saved the point, and the judges were of opinion that the utterer only was liable." See *R. v. Soares*, East, P. C. 974, where one uttered a forged note at Gosport, whilst the others waited for him at Portsmouth; and all the judges were of opinion, that the latter were not guilty as principals. And in the case of *Stewart v. Dickens*, Cor. Garrow, B. Warwick. Sp. Ass. 1818. where the witness had bargained with the prisoners for the purchase of forged notes, and they pointed out to the witness a person from whom the witness received the notes in pursuance of the agreement, in a

few minutes afterwards, but it did not appear that the prisoners were in sight at the time; it was held by the judges, that the prisoners could not be convicted as principals.

It seems to be very doubtful whether the legislature, in framing the stabbing act, ever intended it to apply to a person aiding and abetting; for the main intention was to ensure the punishment of murderers in particular cases, where malice propense could not be easily proved, except from the means of destruction used, 1 Hale, 456. Fost. 298. 1 Kel. 55.; but the inciting and assisting of another to stab a third person, is such an unequivocal act of malice, as to render the aid of the statute unnecessary; yet Mr. Serjeant Hawkins observes, that the cruelty and bloody mind of him who gives the stab, is *peculiar* to himself, 2 Haw. c. 33. s. 98. and in that way explains the exemption of principals in the second degree.

the thing prohibited by it shall be adjudged felons, without benefit of clergy, by necessary implication it makes all the procurers and abettors of it accessories or principals, upon the same circumstances which will make them such in a felony by the common law, and therefore makes all, who are present aiding and abetting, principals in the second degree (*b*).

It seems to be advisable, in such cases, to describe the abettor as a principal in the first degree; for at all events any objection to the indictment itself is by this means avoided; and if the penal clause include an aider and abettor, though not named, it includes him as a principal by construction of law, and he is properly described as such; and if the clause does not extend to an aider and abettor, he cannot be made liable by the form in which he is charged.

Where a statute specifically mentions aiders and abettors, it seems to be sufficient to charge them as principals in the first degree (*c*).

If one maliciously aid and abet another who strikes the blow, they may be charged in the same indictment with different degrees of homicide,—the abettor with murder, the party who struck with manslaughter (*d*). But if the bill charge two with murder, and the jury find it only manslaughter in one, a new bill for that offence should be preferred against him (*e*).

(*b*) The Coalheavers' case, Leach, 76. *R. v. Midwinter and Sims*, Leach, 78. in the notes. Fost. 416, 2 Haw. c. 33. s. 98.

(*c*) *R. v. Mouncer*, Leach, 3d ed. 645, East, P. C. 638, 9.

Ld. Hale was of opinion that aiders and abettors might be charged generally.

(*d*) 2 Haw. c. 29. s. 7.

(*e*) 2 Hale, 162. 2 Roll. R. 408. 1 Sid. 230. 3 Buls. 206.

As to the form of charging defendants as aiders and abettors.

After alleging the offence of the principal with its circumstances, the indictment may allege generally, that E. F. &c. was *feloniously* present, aiding and abetting at the felony and murder (as the case is) committed in manner and form aforesaid (f).

And the averment that the party was present aiding and abetting, cannot be supplied by any argument, implication, or intendment (g). A person may indeed be an abettor to a felony, though he be not actually present; for if several set out together, or in small parties, upon one common design, whether of murder, or felony, or for any other unlawful purpose, and each takes the part assigned to him,—some to commit the fact, and others to watch, &c. they are all, provided the fact be committed, in the eye of the law present at it (h).

But without attempting to define what does in law amount to such a presence as will constitute the party an abettor, suffice it to observe, that in all cases where a person is either actually or constructively present, aiding and abetting in the commission of a felony, his offence may be averred by the general words already mentioned. In indictments for homicide, it is safer to allege the abetment generally; but if it be laid specially, it should be applied to the stroke, and not to the death (i). And it seems to be proper in such cases to aver, that the principal and abettors jointly made the felonious assault of malice prepense; and to aver, in conclusion, that they all murdered the deceased (k). But where the stroke and death are on

(f) 4 Co. 42. Heydon's case.

(g) 4 Co. 42.

(h) Post. 350.

(i) 4 Co. 42. 2 Haw. c. 29.

s. 17.

(k) See the Ind. Mackally's case, 9 Co. 62.

different days, it would be repugnant to allege, that the party was present aiding and abetting at the felony and murder the first day ; because the felony was not complete before the death, and a man cannot be made a felon by a fictitious relation of the death to the time of the stroke (1).

(1) Heydon's case, 4 Co. 42. And therefore the year, within which an appeal must be brought, is to be computed from the death, and not from the stroke. 4 Co. 42. 2 Ins. 320. Staunf. 63. contra. But if a man, *non compos*, strike

himself, and afterwards become sane, and die of the blow, he shall forfeit nothing ; for the death shall have relation to the stroke. 22 E. 3. Corone, 244. 3 Ins. 54. 4 Co. 42. 2 Ins. 318.

CHAP. VII.

Of setting forth the Means and Manner of committing the Offence, with the Circumstances immediately connected therewith. And of Overt Acts in Indictments for Treason.

I. Forcible Means, &c.

II. Fraudulent Means, &c.

III. Illegal Solicitations, Attempts, and Endeavours.

IV. Misconduct in Office, Extortions, &c.

V. Illegal Combinations and Conspiracies.

WHERE the particular means, which are used to effect a criminal object, are essential to the constitution of the offence, it seems to be a general rule, that such means must be described on the record, to enable the court to see that the jury have formed their conclusion upon proper premises. In an indictment, therefore, for obtaining money by false pretences, it is necessary to specify the pretences, that they may judicially appear to have been such as fall within the purview of the statute. And the same reason applies to all indictments for publishing libels, or uttering profane and blasphemous or seditious words, for forgery, perjury, and the sending of threatening letters. For in all these cases, and many others, matters of fact are so mixed up with questions of law, as to render it necessary to describe the means and manner of committing the offence upon the record, in order to subject them to judicial examination.

There is besides a degree of particularity and preci-

sion, which is called for in the description of the offence, for the purpose of informing the defendant what is intended to be proved against him, and of so identifying the charge, that an acquittal or conviction may enure to his subsequent protection.

In this chapter, then, it is proposed to examine with some minuteness, in what cases, and with what degree of precision, it is necessary to allege the *means* and *manner* of offending; and with this view, and for the sake of preserving as much connection as so extensive a subject admits of, instances will be selected, which range themselves within the following classes:

The *first* comprising offences committed by *forcible* means, such as murder, burglary, and larcinies of every description.

The *second*, offences committed by *fraudulent* means, including forgery, perjury, and other indictable frauds.

The *third*, all procurements by illegal *solicitation*, &c. as by accessories before the fact, &c.; and also offences resting in tendency, whethèr they consist in bare solicitation, in the publication of libels, in the speaking of blasphemous or seditious words, (which may not improperly be considered in the light of solicitations,) or in any other criminal *attempt* or *endeavour*.

The *fourth*, all offences consisting of misconduct in office, as by the extortion of money, &c.; and, as analogous to these, the sending of threatening letters, and the extortion of money, by threats of legal process.

The *fifth*, illegal *combinations* and conspiracies.

1. *Offences committed by FORCIBLE means.*

It is still usual, in indictments for forcible injuries, to make use of the technical words, *vi et armis*, but by the stat. 37 H. 8. c. 8. it is enacted, that "inquisitions or indictments, lacking the words *vi et armis*, viz. *baculis cutellis arcubus et sagittis*, or any such-like words, shall

be taken, deemed, and adjudged, to all intents and purposes to be as good and effectual in law, as the same inquisitions and indictments, having the same words, were theretofore taken, deemed, and adjudged to be." These words are, therefore, clearly superfluous (a), even where the crime is of a forcible nature, and were unnecessary at common law, where the injury was not forcible (b).

The description of an injury to the person, is usually prefaced by an averment, that the defendant, "in and upon A. B. made an assault;" and where the offence amounts to felony, the indictment should aver, that the *assault was feloniously* made, and will be defective if the averment be omitted (c).

In appeals and indictments of homicide, a great degree of minuteness has ever been held essential to the description of the instrument and means by which the crime was perpetrated, although great latitude has been permitted in departing from such a description in evidence.

Thus, it is usual to state the particular weapon with which the mortal blow was inflicted, or the species of poison which was administered; but evidence may be given of a blow inflicted by a different instrument, or, that the death was effected by means of a different species of poison (d), provided the nature and kind of destruction proved, agree in substance with that alleged. Thus, if the wound be stated to have been inflicted with a dagger, it will be satisfied by proof of a striking

(a) 2 Lev. 221. Cro. J. 187. 1 Haw. c. 34. s. 3. 1 Hale, 473. 3 P. Wms. 497. 534. 3 Ins. 68. Pulton, 131. b.

(b) Skinner, 426. 2 Haw. (c) *R. v. Pelfryman and Randall*, Leach, 641.

c. 25. s. 90. And in case of murder, the force at common law is implied from the very nature of the offence, 2 Hale, (d) 3 Ins. 50. Mackally's case, 9 Co. 67.

with a sword, rapier, staff, or bill (e), for, they produce the same kind of mischief; and it is said, that the word *struck*, is the essential term (f), whence it should seem that if the death be proved to have ensued from a *striking*, a variance from the instrument alleged will be immaterial. But evidence cannot be given of a species of death, totally different from that specified; therefore, if it be alleged to have been effected by striking, it cannot be proved by evidence of poisoning, strangling, or starving (g). It is usual also to allege the manner in which the weapon was held, as, that it was held in the defendant's right hand, or in both his hands, and to state its value; but these averments do not seem to be material (h). It is necessary to set forth a description of the wound, (or other mischief effected by the stroke,) the part of the body (i) in which it was inflicted, and its dimensions, with great certainty. Thus it has been holden to be insufficient, to allege that the wound was given about the breast (j), or about the navel (k), or on the arm; or side, without saying, which arm or side (l); but, if the wound be once well described, a subsequent imperfect description will not vitiate the indictment; as, if the wound be alleged to have been given on the left side of the belly, about the navel; for the first part of the description is

(e) 9 Co. 67. In Sharwin's case, East, P. C. 341. the allegation of an assault with a wooden staff, in an indictment under the stat. 7 G. 2. c. 21. was held to be satisfied by proof of an assault with a stone.

(f) Cro. J. 635. Palm. 282. 5 Co. 122. 2 Hale, 185. 1 Buls. 124:

(g) Hale, 291.

(h) 2 Hale, 285. 2 Haw. c. 23. s. 79, 80.

(i) 4 Co. 40. 2 Haw. c. 23. s. 80.

(j) Young's case, 4 Co. 40. 2 Hale, 181.

(k) Walker's case, 4 Co. 41.

(l) 2 Hale, 185. Webster's case, 31 Eliz. 5 Co. 131. Sty. 76.

certain, though the latter is uncertain (*m*). The dimensions of the wound must be described, its length and depth (*n*). But it is sufficient to allege, according to the real circumstances of the case: as, that the defendant struck a mortal blow, on such a part of the body, or gave him, in such a part, a mortal wound, penetrating into, and through his body (*o*).

Where several blows have been given, or different kinds of poison have been administered, it may be averred, that if the party did not die of the one, he died of the other (*p*); or, it may be alleged, generally, that he died of the said several blows, so struck, or of the poisons so administered (*q*). The reason for requiring the means to be set out with such particularity, seems to have been, that the court might see that the wound was serious enough to occasion death.

It must be averred, that the wound, or bruise, was mortal (*r*); and finally, the adequacy of the means to produce death must be further shewn, by a direct averment, that the party died of the stroke, or poisoning, and this cannot be supplied by any implication or intendment whatsoever (*s*).

In an indictment for burglary, it is unnecessary to state the particular means of breaking and entering; it is sufficient to allege generally, that the defendant broke and entered (*t*).

In case of robbery from the person, it is not necessary to state the particular means by which the prosecutor was induced to yield up his property, or to state any

(*m*) Walker's case, 4 Co. 41.

(*n*) 2 Hale, 186. 2 Haw. c. 23. s. 81.

(*o*) East. P.-C. 342.

(*p*) Young's case, 4 Co. 40.

(*q*) Weston's case, 3 Ins. 50.

(*r*) Lad's case, Leach, 112.

(*s*) 2 Hale, 186. 1 Haw. c. 23. s. 82, 83. Kel. 125.

(*t*) 1 Hale, 549.

94 INDICTMENT.—*Means and Manner.*

particular threats or violence, or even to allege, that he was put in fear; it may in all cases be alleged, generally, that the offence was done *violenter et contra voluntatem* (u).

In an indictment for simple larciny, it is unnecessary to set forth the particular means or contrivance (x) made use of to gain possession of the property, or to remove it; but the indictment alleges generally, that the defendant feloniously stole, took, and carried away the goods.

In the description of inferior injuries to the person, such as battery, it is unnecessary to state the particular means by which the bodily harm was effected; it seems to be sufficient to allege, that the defendant did beat, strike, wound, &c. and to aver the damage thereby done to the person assaulted (y).

An indictment for a forcible entry at common law, must charge the defendants with having used such a degree of force, as amounts to a breach of the peace (z). But it is sufficient, in such an indictment, to aver, that the defendants unlawfully, and *with a strong hand*, entered the prosecutor's mill, &c. and expelled him from the possession thereof (a).

II. *Offences committed by FRAUDULENT means.*

It seems to be an universal rule, that in the description of all crimes founded in fraud, the *instrument, or means of fraud, must be specified.*

And this is necessary, because every fraud is not an

(u) 1 Hale, 534. Fost. 128. necessary to specify the instrument. *R. v. Speed*, Carth, 502. East's, P. C. 783.

(x) 1 Hale, 504. 2 Hale, 184. 1 Ld. Ray, 584.

R. v. Moore, Leach, 354.

(z) *R. v. Wilson* and others,

(y) In a conviction for killing deer it was held to be un- 8 T. R. 357. 6 Mod. 178.

(a) *Ib.*

indictable offence; thus, at common law, a man who obtains money by a mere naked lie, is not criminally (b), though he may be civilly responsible; whether particular circumstances constitute an indictable fraud, is a question of law; and therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to shew that the facts amount to an indictable offence. Hence, an indictment for cheating, at common law, cannot be maintained, unless some specific false token be alleged to have been used (c).

And under the stat. 33 H. 8. against obtaining money by false tokens, it is necessary to specify the particular tokens (d), for the statute is confined to tokens and letters, in the name of a third person (e).

So, under the statute against obtaining money by false pretences (f), it is necessary to describe the false pretences, because some false pretences are not within the statute (g).

So, in all cases of forgery, it is necessary to set out the forged instrument, that it may judicially appear, that the crime of forgery has been committed, either as an offence at common law, or under the definition of some particular statute.

Next, it is to be considered, how far it is necessary to particularize, in describing the means of effecting a fraud. And first, it may be observed, that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial.

(b) *R. v. Lara*, 6 T. R. 565. (f) 30 G. 2. c. 24.

(c) *Ib.* and 1. Haw. c. 71. (g) 2 Burr. 1127. *Mason's*
s. 1. *R. v. James*, Cald. 558. case, Leach, 548: *R. v. Munor*,

(d) *R. v. Mason*, Leach, 548. 2 Str. 1127. Leach, 720.

(e) *R. v. Pears*, East, P.C. 3d. ed.
7 Mod. 316. 2 Str. 1127. 2 T.

R. 581.

In the case of the *King v. Young* and others, the indictment (*h*) stated that the defendants did falsely pretend to one Thomas, that Young had made a bet of 500 guineas, with a colonel in the army, then at Bath, that one Lewis would, on the next day, run on the high road, leading from Gloucester to Bristol, ten miles in an hour; and, that Young and Mullins (*i*) went each 200 guineas in the bet, and Randal (*k*) the other 100 guineas; and, that *under colour* of having made the same bet, they obtained from Thomas 20 guineas, as a part of such pretended bet. It was objected, upon writ of error, that the statement was too general, no person having been specified with whom the wager was laid; but the court held, that this objection was answered by the record. That if the indictment did not inform the defendants what charge they were called upon to answer, the objection would be well founded, but, that it held out to them sufficient intelligence of the offence imputed to them; that the court could not intend that the colonel's name was mentioned, and that the prosecutor could not state it with greater particularity than the defendants used.

And this is very analagous to the offence of obtaining money by extortion, in an indictment for which, it has been holden to be sufficient to charge a bailiff, with having extorted a particular sum of money, *colore officii* (*l*), without stating the particular threats or menaces; for, it was said he perhaps might claim it generally, as being due to him as bailiff, in which case, the taking could not have been otherwise expressed.

It is not necessary expressly to aver that the tokens,

(*h*) Leach, 568.

(*l*) Sid. 91. 2. Haw. c. 25.

(*i*) One of the defendants.

s. 57.

(*k*) Another of the defend-

ants.

or pretences, were false (*m*). In Terry's case, the indictment alleged, that he, by a false note, in the name of J. D. obtained into his hands a wedge of silver, and it was holden to be good, though the token was not alleged to be false. So, in Airey's (*n*) case the indictment was holden to be good, although it did not expressly allege that the pretences were false, but, after setting them out, averred, that by means of the said *false* pretences, the defendant unlawfully obtained from J. B. 16s. with intent to cheat the said J. B. and then negatived the truth of the pretences. The court held, that no technical form or order of words was necessary to express the offence; and, that it was sufficient, if, upon the whole, it appeared that the money had been obtained by means of the pretence set forth, and that such pretence was false.

But it is necessary expressly to negative the truth of those pretences, by means of which the property was obtained, in order that the party may know what it is that he comes to defend (*o*).

In all these cases, the false tokens and pretences must be proved as laid. Where the indictment alleged the pretence to be that the defendant had paid a sum of money into the bank of England, and upon the trial it appeared that he had *said* that the money had been paid into the bank; the variance was held to be fatal, since a statement that the money had been paid into the bank, was very different from an assertion that it had been paid in *by the defendant* (*p*).

Where the fraud has been effected, or attempted to be

(*m*) Cro. Car. 564.

(*n*) 2 East. R. 30.

(*o*) *R. v. Perrott*. 2 M. & S. 379. Where for want of such negative allegations the judg-

ment was reversed on a writ of error.

(*p*) *R. v. Plestow*, Cor. Ld. Ellenborough. 1 Camp. 494.

effected, by means of a written instrument, it must, without exception, be set out upon the record, in order that the court *may be judicially informed of its criminal nature*; and the same principle extends to indictments for *libels*, and the sending of *threatening letters* (q).

It will next be considered, what precision is requisite in setting forth written instruments, of this nature, upon the face of the indictment.

The allegations, in an indictment for *forgery*, naturally distribute themselves under the following heads,

First. That the defendant did *falsely make, alter, &c.*

Secondly. The *particular instrument* set forth.

Thirdly. With the *intent to defraud* another.

First. It is sufficient to allege that the defendant forged and counterfeited, though it is usual to aver that he did *falsely* forge and counterfeit, for the adverb is sufficiently implied in the former words (r). In Elsworth's (s) case, the indictment stated that the said T. E. the said bill of exchange did feloniously *alter*, and cause to be altered, by *falsely* making, forging, and adding a cypher 0, to the letter and figure 8/. in the said bill, and also by *falsely* making, forging, and adding the letter y to the word eight, in the bill mentioned, whereby, &c. The second count alleged, that certain persons unknown altered the bill, and charged the defendant with uttering and publishing the bill, as true, knowing it to be forged. The words of the statute, on which the indictment was founded, (2 G. 2. c. 25. s. 1.) are, "If any person shall *falsely make, forge, or counterfeit.*" It was objected, in arrest of judgment, that the indictment merely charged that certain persons

(q) *R. v. Lloyd*, East. P. C. 2 Lev. 221. *R. v. Dawson*, 1122. Leach, 720. 696. 3d. ed. 1 Str. 19.

(r) Sty. 12. 1 Str. 19. East, (s) *Coram Willes*, York, Lent P. C. 985. *R. v. Mariot*. Ass. 1780. East. P. C. 986.

unknown, did alter, *by falsely making, &c.* and did not charge, in the words of the act, that they *falsely made, forged, &c.* and that the word *alter*, was not used in the statute. But the judges held, that the indictment was good, and that there was no difference in substance, or in the nature of the charge, whether the indictment were for feloniously altering, by *falsely making and forging*, or for feloniously making and forging, by *falsely altering*. In the case of the *King v. Bigg (t)*, the indictment alleged, that the defendant feloniously *erased* an indorsement from a bank note; the jury found that the defendant had expunged the inscription, by means of some unknown liquor, and the judges held that the prisoner was guilty (u).

In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole.

In Dawson's case, it was holden, by ten judges, that the *alteration* of the figure 2, in a bank note, to 5, was a forging of a bank note (v).

And, an indictment (x) for making, forging, and counterfeiting a bill of exchange, under the st. 7 G. 2. c. 22. was holden to be supported by proof, that the defendant had altered a bill of exchange for the payment of 10*l.* into 50*l.* both in words and figures. It was objected, that the defendant ought to have been charged with altering the genuine bill, since the stat. 7 G. 2. c. 22. makes it a distinct offence to *alter*; but the judges, on the authority of Dawson's case, held that the conviction was proper, and that every alteration of a true instrument, for such a

(t) 3 P. Wms. 419.

(u) The majority were of this opinion, but the case involved many other points, and the prisoner was afterwards pardoned,

on condition of transporting himself. Str. 19.

(v) East. P. C. 978.

(x) Teague's case, coram Le Blanc, Hereford Ass. 1802. East. P. C. 979.

purpose, made it, when altered, a forgery of the whole instrument.

But, in cases where a genuine note, or instrument, has been altered, it is usual to allege the *alteration* in one count of the indictment (y).

It is not sufficient to aver, that the defendant forged, or caused to be forged, for it is not certain and positive (z).

Secondly. The *particular instrument set forth*.

Herein may be considered,

1. *In what manner it should be set forth.*

2. *How it should be shewn to be the instrument, (supposing it to be genuine,) the forging of which is prohibited.*

1. The instrument set forth may be prefaced by the words, "*to the tenor following,*" or "*in these words,*" or "*as follows,*" or "*in the words and figures following;*" for, though the setting out an instrument by the *tenor* (a), which imports a true copy, is the most technical mode, yet it has been holden that the words "*as follows,*" are equivalent to the words "*according to the tenor following,*" or "*in the words and figures following,*" and that, if under such an allegation, the prosecutor fail in proving the instrument, verbatim, as laid, the variance will be fatal (b). And unless the indictment profess, by these, or similar expressions, to set out a copy of the instrument in words and figures, it will be vicious (c). An accurate (d)

(y) See East's P. C. 980. R. v. Harrison. R. v. Elsworth, there referred to.

(z) 1 Salk. 342. 5 Mod. 137. Holt. R. 345.

(a) R. v. Drake. 3 Salk. 224. Holt. R. 347. 349. 350. 425. 11 Mod. 95.

(b) R. v. Powell, Leach, 90. 2 Bl. Rep. 787. East. P. C. 976.

(c) Lyon's case, Leach, 696.

(d) Hunter's case, Leach, 721.

Mason's case, Leach, 548.

copy of the instrument, in *words* and *figures* (*e*), must then be set forth, to enable the court to see that it is one of those instruments, the false making of which the law considers to be a forgery (*f*); a reason, which applies with equal force to indictments for libels and threatening letters (*g*).

In setting forth the *tenor* of an instrument, a mere variance of a letter will not vitiate the indictment, provided the sense be not altered by changing the word misspelt, into another of a different meaning. Thus (*h*), in an indictment, for forging a bill of exchange, the tenor was “value *received* ;” the bill proved in evidence, was for value *reicevd*, and the judges (*i*), upon the reserved question, were of opinion that the variance was not fatal, since it did not change the *word* into another. So, in an indictment for (*k*) perjury, it was assigned for perjury, that the defendant had sworn that he *undertood* and believed, in the affidavit he swore that he *understood* and believed. Upon a motion for a new trial, Lord Mansfield, C. J. said, we have looked into all the cases on this subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*; but that case is shaken by the doctrine laid down in Hawkins. The true distinction seems to be taken

(*e*) *R. v. Powell*, Leach, 90. East. P. C. 976. Hart’s case, Leach, 172.

(*f*) Lyon’s case, Leach, 696. Mason’s case, East. P. C. 975. Gilchrist’s case, Leach, 753. In indictments for forging particular stamps which the legislature has directed to be used, it appears to be unnecessary to give any particular description of the

stamp. See Palmer’s case, East. P. C. 893. Collicot’s case, 4 Taunt. 300.

(*g*) *R. v. Lloyd*, East. P. C. 976.

(*h*) *R. v. Hart*, Leach, 172.

(*i*) De Grey, C. J. and Willes, Justice, were absent. East. P. C. 978.

(*k*) *R. v. Besch*, Leach, 158. 2 Haw. c. 46. s. 190.

102 INDICTMENT.—*Means and Manner.*

in the *Queen v. Drake* (l), that where the omission, or addition of a letter, does not change the word, so as to make it another word, the variance is not material (m).

In Elizabeth Dunn's case, the indictment charged the defendant with forging a promissory note, the tenor of which is as follows, and then set out the note, including the attestation, "witness, John Whettal," and also the words, "*Mary Wallace, her mark.*" The fact was, that the attestation, and the subsequent words, had been added after the defendant had affixed her mark; and the recorder doubted, whether the indictment had been proved, since the note forged by her, differed from the tenor set out. But Mr. Baron Perrot and Mr. J. Aston were of opinion, that the indictment, in this respect, was well proved (n).

Whether it be necessary to set out the whole of the forged writing.

In the short report of Smith's case, in the first volume of Salkeld (o), it is stated, that the defendant was indicted

(l) Salk. 660.

(m) *R. v. Beech*, Leach, 158. See Salk. 660. *R. v. Bear*, Carth. 408. Holt, R. 350. Cowp. 229. *R. v. Mag. Doug.* 193. In Oldfield's case, Cor. *Bayley, J. v. Durham*, Summ. Ass. 1811, and afterwards before the Judges, where in setting out the bill, it was alleged to be directed to Messrs. M. P. and Co. and the bill on being produced was directed to Mess^r. M. P. and Co. the *r* in Messrs. being omitted, the variance was held to be immaterial. See Russel, 1482.

(n) Leach, 68. East. P. C.

961. The defendant directed the name, Mary Wallace, to be affixed to the mark which she had made, and was present when the name and attestation were added. In this case, the question arose, whether to make a mark, in the name of another person, with intent to defraud that person is forgery; and nine of the judges were of opinion, that it was, but Mr. J. Aston differed from them, and on that account the defendant was recommended to mercy, Leach, 68.

(o) Salk. 342. Pasch. 2 Ann.

for forging a deed of assignment of a lease, signed with the mark of one *Goddard*, *cujus tenor sequitur*, but sets not down the mark as in the assignment; it was objected, that without the mark it could be no forgery, and the objection was over-ruled. But this is a very loose report of the case, which appears to be the same with that reported in the third volume of *Salkeld*, and by Lord Raymond, under the title of the *Queen v. Goddard* (p), according to which the defendant was indicted for forging an assignment of a lease, and the tenor was set out; at the bottom of the assignment was the mark of the assignor, but no mark appeared on the *postea*; and the whole court held, that since, by the statute of frauds, an assignment must be signed, the want of the mark of the defendant (q) upon the *postea*, was a fatal defect, but as another indictment had been found against the defendant, the court gave no judgment, but ruled that the defendant should plead to the *signing* (r). But Lord Holt held, that if the indictment had been for forging a deed (s) of assignment, and the deed had been set forth, without any mark or signing, that might have been good, because signing is not necessary to a deed; for in former times they were sealed only, and not signed (t). And it seems, in all cases, to be sufficient to set out that part of a written document, which comprehends the particular instrument forged, though connected with other matter. Thus, in an indict-

(p) In 3 Salk. 171. Trin. 2 Ann, *R. v. Goddard* et al. *Ld. Ray.* 920. *R. v. Goddard* and *Carlton*.

(q) This must be a mistake in the report, 3 Salk. 171. the defendant could not have forged his own mark.

(r) This also seems to be a mistake, for "new indictment" the defendant had been convicted on the faulty indictment.

(s) Mr. East, in his *Pleas of the Crown*, p. 976. cites Salk. 342. and questions this point.

(t) Salk. 342. Pasch, 2 Ann.

ment for publishing a forged receipt *for money*, the receipt alone was set forth, as follows, "18th March, 1733, received the contents above, by me, Stephen Withers;" and, upon its appearing in evidence, that the above was forged at the bottom of a certain account, it was objected, that the account itself should have been set forth, for otherwise, it would not appear that it was a receipt for money. But all the judges held the indictment to be sufficient; for it was laid to be a forged receipt for money, under the hand of S. W. for 1*l.* 4*s.* and the bill itself was only evidence to make out that charge (x).

2. *How the forged instrument should be shewn to be of the kind prohibited.*

It must invariably be shewn on the face of the indictment, by proper averments, that the instrument forged is of the particular kind prohibited by the statute upon which the indictment is founded.

A forged instrument cannot in strictness be called by the name of the real instrument which it assumes to be; an instrument, purporting to be a bond or writing obligatory, is not such, for no one is bound by it; and a forged writing, purporting to be a will, ought not in strictness to be called a *will*, for it is not so in any sense, and can have no legal operation whatsoever.

But many statutes describing the offence of forgery, use the words, "and if any person shall forge any *will*, or *bond* (y), or *writing obligatory*, &c."; and, therefore, it may be averred in the indictment, that the defendant forged the will (z), bond, or writing obligatory (a). But it is in all cases proper, and seemingly more correct, to

(x) *R. v. Testick*, 1 East, 180.
East. P. C. 925.

(y) 22 G. 2. c. 25.

(z) *R. v. Birch and Martin*,
Leach, 92 East. P. C. 980.

(a) *Dunnett's case*, East,
P. C. 985.

aver, that the defendant forged and counterfeited a certain paper writing, *purporting* to be the last will (or other instrument whose forgery is penal.) In the case of the *the King v. Birch and Martin*, it was so averred, and the judges held, that although the statute uses the words, "shall forge a will," it was sufficient to lay it either way (b). And, therefore, in general, if it can be collected from the forged writing itself, that it assumes to be a bond, &c. it may be averred in the indictment, either that the defendant forged a certain bond, or that he forged a certain writing purporting to be a bond. Thus, in Taylor's (c) case, the defendant was charged with forging a receipt for the sum of 20l, as followeth, "Recd. R. Wilson." And in Testick's case (d), the tenor set out was, "Received the contents above, by me, William Withers", and this was holden to be properly described as a receipt. For in each of these cases the very terms of the forged writing shewed, that it assumed to be a receipt.

The *purport* (e) of a writing is that which appears on the face of that writing; if, therefore, the forged writing assumes in terms to be a will, bond, or receipt, it may be described as *purporting* to be a will, bond, or receipt. But in alleging the *purport* of a forged writing, great caution is necessary; for unless it can be collected plainly from the terms of the writing set forth, that it is in form and assumes to be that particular instrument, which, according to the allegation, it purports to be, the indictment will be vicious. Thus in William Jones's (f) case, the indictment alleged "purporting to be a bank note," the

(b) *R. v. Birch and Martin*,
Leach, 92. East. P. C. 980.
2 Bl. R. 790.

(d) 1 East, 180.

(e) *R. v. Gilchrist*, Leach,
757.

(c) *R. v. Taylor*, Leach, 255.
East. P. C. 977.

(f) Leach, 243. East. P. C.
883. Doug. 302.

writing set forth was as follows: No. F. 946.—I promise to pay John Wilson, esquire, or bearer, ten pounds, London, March 4th, 1776, For self and Company of *my* bank in England, Entered, T. Jones." And the court were of opinion that the paper writing did not *purport* to be a bank note, and therefore that the indictment was repugnant. So an indictment for forging a bill of exchange, as purporting to be directed to John King by the name and addition of John Ring esq. was for the same reason holden to be vicious (g). The same was holden of an indictment, which described the subscription C. Olier as purporting to be the name of Christopher Olier. (h)

And in Gilchrist's (i) case, the indictment charged the defendant with forging a paper writing, &c. purporting to have been signed by Thos. Exon, clerk, and to be directed to *George Lord Kinnaird*, Wm. Morland, and Thos. Hammersley, of, &c. bankers and partners, by the name and description of Messrs. Rawson, Morland and Hammersley; the tenor of the bill was then set out as follows, "*Messrs. Rawson, Moreland, and Hammersley* please to pay &c. (signed) T. Exon."; and the indictment was by the ten judges present at the conference, holden to be repugnant and defective, for it could not

(g) *R. v. Jeremiah Reading*, Leach, 672.

(h) *R. v. Reeves*, Leach, 933. The objection was at first overruled by Heath and Lawrence, Js. and Thomson, B. who thought that there was a shade of difference between this case and that of Gilchrist; and it does not appear what the ultimate opinion was. In Lovell's

case, East. P. C. 990. Leach, 282. the indictment ran thus, "purporting to be directed to Messrs. Drummond and Co. Charing-cross," by the name of Mr. Drummond," and the indictment was held to be good, but it does not appear that the objection was taken.

(i) Leach, 753. East. P. C. 982.

purport to be directed to Lord Kinnaird, since his name did not appear upon the bill.

And with respect to the word *purport*, it is to be observed generally, that its use is to shew that the forged writing falls within the prohibited description; and, therefore, no other description should be given under the word *purport*, except of the particular nature of the forged writing, as that it purports to be a bond, a bill of exchange, a bank note, or the like. Any further description is highly objectionable; since it is unnecessary, and exposes the record to great danger from variance (*k*).

And the same objection applies to giving any other description of the written instrument, (whose tenor is afterwards set forth,) beyond that of its general nature.

The defendant was indicted for forging and uttering a bill of exchange, requiring, &c. and *signed by Henry Hutchinson*, for, &c. Upon the trial, the prosecutor proved, that the signature *Henry Hutchinson* was forged; it was then objected, that the indictment averring it to have been signed by him, was disproved; and so the judges held upon reference to them after conviction (*l*). And an indictment will be defective, if it allege, after describing the forged writing, “by which A. is bound to B.,” for since it is a forgery, A. could not be bound by it (*m*).

An indictment charged the defendant with forging a *bond and writing obligatory*. The statute upon which it was founded, mentions bond and also writing obligatory. The instrument set forth purported to be a bond, but the judges held, that it was properly described (*n*).

(*k*) See Mr. Justice Buller’s observations, *R. v. Gilchrist*, Leach, 753.

(*l*) East, P. C. 985.

(*m*) Bac. Ab. tit. Ind. 556.

(*n*) *R. v. Dunnett*, East, P. C. 985. For a bond is a writing obligatory, and at all

In Bigg's case, the prisoner was charged with erasing an indorsement (o) on a bank note; it turned out in evidence, that the inscription charged to have been erased, had been written, according to the custom of the bank, upon the *inside and face* of the bill. The jury found specially, that an inscription so written was commonly called an *indorsement*, and a majority of the judges held, that the description was correct.

Instruments of other specific denominations, may, it seems, be described as warrants or orders, if they be in effect such (p). And a bill of exchange, it has been held, may be laid as an order for the payment of money (q).

Where the instrument is not apparently within the description of the act, it must be brought within it by proper averments, otherwise the indictment will be defective.

In Hunter's case (r), the indictment set forth a navy bill with a certain indorsement upon it, and then alleged, that the defendant did forge a certain *receipt* for money, to wit, for the sum of 25*l.* contained in the said navy bill, as follows, that is to say "*Wm. Thornton and Wm. Hunter.*" In evidence it appeared, that a bare signature written upon a navy bill, operated as a receipt. The prisoner was convicted, but the judges were of opinion, that the indictment was insufficient; for although it avers, that the prisoner forged a certain *receipt* for money, there is nothing stated to shew, that the instrument, which does not on the face of it import to be a receipt, *is in fact a receipt*, or was intended to be a receipt, or could operate as a

events, semble, the subsequent description would be but surplusage. *Shepherd, Leach, 265. East. P. C. 944.*

(o) 3 P. Wms. Str.

(q) Willoughby's case, East. P. C. 944.

(p) Lockett's case, East. P. C. 940. Leach, 110. R.

(r) Leach, 711.

receipt. That it is not enough to call the signature of these two names a receipt, for they do not, standing by themselves, import to be a receipt; and, therefore, the indictment should have averred, that the said names, Wm. Thornton and Wm. Hunter, written on the said paper, imported and signified, that the said Wm. Thornton and Wm. Hunter had received the sum of 25*l*. mentioned in the said paper writing.

For the same reason, an indictment for forging a deed must aver that it was sealed (*s*).

An indictment for forging an order for the delivery of goods, must shew that the person whose name is subscribed, had authority to make such an order (*t*). But it is sufficient, if the order purport that the party sending it had such authority, although, in fact, he had not (*u*). And it must, for the same reason, appear that the person to whom the order is directed, had possession of the goods (*x*).

And further it has been holden, that if the instrument, as stated with proper averments upon the record, be such as if genuine would be illegal, the indictment will be vicious and ineffectual; and therefore, in the case of the *King v. Moffat* (*y*), for forging a bill of exchange for the payment of three guineas, without specifying the payee's place of abode, the judges were of opinion, that the forgery did not amount to a capital offence; since, by the statutes 15 G. 3. c. 51. and 17 G. 3. c. 30. (*z*) the bill of exchange, if real, would not have been valid (*a*).

(*s*) 3 Keb. 388. 3 Ins. 169.
Smith's case, 3 Salk. 171.

(*t*) East. P. C. 958. 2
Leach, 3rd Edit. 611.

(*u*) Fost. 119. East, P. C.
940.

(*x*) East. P. C. 940. Clinch's
case, East. P. C. 911.

(*y*) Leach, 483.

(*z*) Made perpetual by 27
G. 3. c. 16.

(*a*) Wall's case, East. P. C.
953.

110 INDICTMENT.—*Means and Manner.*

And in Smith's case (*b*) above alluded to, the court were of opinion, that an indictment for forging an assignment would be vicious, unless it shewed that the assignment was signed. *The distinction seems to be this*, where the instrument appears to be valid, an indictment may be maintained, although from some collateral defect, that instrument, if genuine, could never legally have been put in ure; otherwise, where the defect is apparent on the face of the instrument (*c*). Hence an indictment has been holden to be maintainable for forging a conveyance, though the estate was described by the wrong name (*d*); for forging a protection in the name of one as a member of parliament, who was not so (*e*); for forging and publishing a writing as the last will of a person still living (*f*); for forging an order for the payment of a seaman's prize money, though in fact the seaman was, at the time when the note bore date, in a situation which rendered the order invalid under the stat. (*g*) 32 G. 3. c. 34. s. 2.

And to go one step further, it has been frequently decided (*h*), that an indictment is maintainable for forging an instrument upon paper, &c. without a stamp, even though a stamp could not afterwards be legally impressed, on the ground that the revenue laws do not make any alteration in the offence of forgery. And this seems to be

(*b*) 3 Salk. 371.

(*c*) Per Eyre, *J. R. v. Jones and Palmer*, East. P. C. 991. Leach, 405.

(*d*) *Japhet Crooke's case*, Str. 901. Fitzg. 57. Masterman's notes.

(*e*) *R. v. Deakins*, 1 Sid. 142.

(*f*) *R. v. Murphy*, 10 St.

Tr. 183. *R. v. Sterling*, Leach, 117. *Cogan's case*, 2 Leach, 503.

(*g*) *R. v. M'Intosh*, East, P. C. 965.

(*h*) *Hawkeswood's case*, Leach, 295. East. P. C. 955. *Morton's case*, East. P. C. 955. *R. v. Reculist*, East. P. C. 956. *R. v. Davis*, ib.

a mean class of cases between those where the defect is altogether collateral to the instrument, and does not appear on the face of it, and those where the defect exists in the very form and structure of the instrument; as where an assignment of a lease is forged without a signature, or a bill of exchange for three guineas, without specifying the payee's place of abode. For an instrument wanting a proper stamp, is apparently and obviously defective; but still the defect does not exist in the form and construction of the instrument. It is not necessary, here to consider, how far, in order to support the allegation of forgery, the writing set out must agree, in form, with the kind of instrument which it is described to be; but it may be observed, generally, that, after setting forth the instrument, and shewing by proper averments that it is within the definition on which the indictment is founded, it is unnecessary to shew that it was stamped (i); or to set forth any collateral circumstances which might be necessary, in order to give the instrument (supposing it to be genuine) a legal operation.

A mere literal mistake in (k) framing the forged instrument, will not bar an indictment (l); but it must be carefully copied in the indictment.

Thirdly. *With the intent to defraud another.*

In indictments for forgery it is also necessary to allege,

(i) *R. v. Morton*, East, P. C. 955.

(k) *R. v. Wall*, E. P. C. 953. The indictment was for forging a will of lands, the will as set out, appeared to have been attested by two witnesses only. No evidence was adduced to shew what estate the

supposed testator had in the lands so devised. And the judges, after conviction, held it to be wrong, on the ground that it was to be presumed that the estate was freehold. See *R. v. Moffatt*, East, P. C. 953.

(l) Clinch's case, East, P. C. 938, 953.

that the act was done with intent to defraud a particular person or body; the averment of intention properly belongs to another division of the subject; but it may be observed here, that it is sufficient to allege a general intention to defraud a particular person, *which intention must be proved as laid (m).*

But it is not essential, either in indictments for obtaining money under false pretences, or in cases of forgery after setting out the false pretences or forged writing, to aver the particular means by which the false pretences were made available in the one case, or how the forged writing was to be made the instrument of fraud in the other.

Thus, in the case of *R. v. Young (n)*, above referred to, after stating the false pretence; namely, a wager, which was pretended to have been betted upon a foot-race, the indictment avers that the defendant, under colour and pretence of having made the bet, obtained from the prosecutor the sum of 20 guineas, as a part of such pretended bet, with intent to defraud and cheat him thereof, without stating by what particular inducement they obtained the money. And in the case of forgery, it is sufficient to aver generally, that the defendant intended to defraud a particular person, without shewing upon the record (o) how he intended to do so.

Of stating the means and manner in an indictment for perjury.

It was formerly the practice to set out the whole of the circumstances in an indictment for perjury, with great

(m) Powell's case, Leach, 90. Elsworth's case, East, P. C. 986. and see East, P. C. 98^a.

(n) 3 T. R. 176.

(o) Powell's case, Leach, 90. East, P. C. 989. Elsworth's case. Crook's case, P. C. 992.

prolixity. In Coke's Entries (*p*), an information under the statute first sets out the statute itself, next the pleading in an action of ejectment, the issue joined, the proceedings upon the trial, the evidence given previous to that on which the perjury is assigned, the evidence on which the information is founded, and the assignment of perjury upon that evidence. But in later times this unnecessary and dangerous minuteness of detail has been much abridged, and principally by an excellent statute passed in the reign of George the Second, which (*q*) was made in order to remove difficulties attending prosecutions for perjury, and which enacts, that "in every indictment or information to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, averring such court to have competent authority to administer the same, together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed."

If the prosecutor undertake to set out more than is required by the act, a failure will be fatal (*r*).

It has frequently been regretted by the judges (*s*), that prosecutors do not avail themselves of this beneficial law, from inattention to which, danger is too fre-

(*p*) Co. Ent. Inform. 367.

See also Co. Ent. 165, 166.

(*q*) 23 G. 2. c. 11.

(*r*) *R. v. Dowlin*, 5 T. R.

317.

(*s*) 5 T. R. 317.

114 INDICTMENT.—*Means and Manner.*

quently incurred, by the introduction of circumstances upon the record, which the statute has declared to be superfluous.

The indictment ought to shew,

1. That a *cause, complaint, petition, &c.* is depending.
2. Before a *court of competent jurisdiction.*
3. That the *matter sworn to was material.*

And further,

4. The *substance of the matter sworn* must be set out.
5. And *perjury* must be *assigned* upon it.

1. It is sufficient, under the act, to allege, generally, that there was a certain cause depending, and that it came on to be tried in due form of law (*l*). So where a person is indicted for perjury committed upon the trial of a prisoner for murder, it is sufficient to allege, that A. B. was in due form of law tried upon a certain indictment then and there depending against him for the murder of C. D. &c. and that the defendant committed the perjury upon that trial (*u*), or that a certain complaint was made, &c. to E. F. then being lord chancellor of Great Britain (*x*).

And it is unnecessary in any case to set out any part of the indictment, declaration, plea, &c. or the issue to be tried at the time when the perjury is alleged to have been committed (*y*).

(*l*) Per Buller, J. *R. v. Dowlin*, 5 T. R. 320.

(*u*) 5 T. R. 520.

(*x*) *R. v. Aylett*, 1 T. R. 63. In an indictment for perjury in an answer to a rule to shew cause in the court of King's Bench, it was held to be unnecessary to allege where the

court sate when the original application was made, or where the rule was made, calling upon the defendant to answer the charge. *R. v. Crossley*, 7 T. R. 315.

(*y*) *R. v. Dowlin*, 5 T. R. 320. and under the express provision of the statute,

2. Before a court, &c. of competent jurisdiction.

The statute 23 G. 2. c. 11. expressly directs that it shall be sufficient to state by what court or before whom the oath was taken, averring such court or person or persons to *have competent authority to administer the same*, without setting forth the commission or authority of the court or person or persons.

And, therefore, to set out the authority of the court would be highly improper, for if the indictment profess to set it out and fail, the defect will be fatal (2).

It is sufficient to say, "he the said A. B. &c. then and there having competent power and authority to administer," &c. (a).

In the case of *the King v. Alford* (b), the defendant was indicted for perjury in the course of a cause tried at the assizes.

The caption of the indictment mentioned the names of both the justices named in the commission, but the defendant was alleged to have been sworn before one only. Baron Eyre doubted whether it should not have been alleged that the oath was taken before *both* the justices mentioned in the commission. It was also doubted whether there was not a variance, since the nisi prius record stated, in the usual form, that the trial was before the justices. But the judges were unanimously of opinion, that the conviction was proper.

3. That the matter sworn to was material.

Although it is no longer necessary to set out the proceedings at length, but sufficient to set forth the substance

(2) Per Lord Kenyon, C. J. *R. v. Dowlin*, 5 T. R. 317. (a) *R. v. Jole*, Trem. P. C. 139.

(b) *Leach*, 179.

116 INDICTMENT.—*Means and Manner.*

of the offence, it is necessary to shew that the point falsely sworn to, was material to the question depending (c); for if it were irrelevant, though false, no indictment can be founded upon it (d). And therefore in the case of *the King v. M'Keron*, the indictment was holden to be vicious, for the want of an averment that the question was material (e). But it seems to be sufficient to aver, that it then and there became and was a material question upon the trial of the said cause, whether, &c. without shewing what issue was joined, or any other previous circumstances or evidence in the cause (f). And in stating the question, which is averred to be material, it seems to be proper to mention those circumstances which must afterwards be connected with the terms of the defendant's oath, in order to assign perjury upon that meaning (g). Thus it may be stated, that it then and there became and was a material question, whether A. B. was at N. in the county of D. at such a time; and then, after setting forth the oath of the defendant, that A. B. was at N. *meaning* the said N. in the county of D.; it may be assigned, for perjury, that the said A. B. was not at N. in the county of D. at the time specified (h).

But where such facts and circumstances are set out, as shew plainly that the question was material to the issue, the express averment does not appear to be necessary, and is rarely to be found in the older precedents,

(c) Per Lord Mansfield, *R. v. Aylett*, 1 T. R. 64. *R. v. M'Keron*, 5 T. R. 318. Louis's case, Cro. Eliz. 148. the judges, on the point reserved. 5 T. R. 318, (f) 5 T. R. 318.

(d) *R. v. Grieppe*, Ld. Ray. 64. obj. 2. (g) *R. v. Aylett*, 1 T. R. 64. obj. 2.

(e) Coram Buller, J. Lancaster, Lent Ass. 1792. and before (h) See below, and Ld. Ray. 256.

where the facts are described at length (*i*). And therefore the averment may be omitted, where the perjury is assigned upon an affidavit on a question before the court, where the materiality appears from setting forth the contents of all the affidavits relating to the subject upon the record (*k*).

4. The *substance of the matter sworn* must be set forth.

It must be alleged that the defendant was upon oath; and for this purpose it is sufficient to aver, generally, that he was *duly sworn* to speak the truth, of and concerning, &c.; and if it be averred that he was sworn upon the gospels, and it turn out that he was sworn in some other manner, according to a particular custom, and not upon the gospels, the variance would be fatal (*l*), though it would *be no variance* if he were sworn both ways (*m*).

In setting forth the matter sworn, it is not essential to profess the same particularity as is necessary in indictments for forgery and libel, which must assume to set out an exact copy. But it seems to be sufficient to say, that the defendant, upon the trial of the said cause, &c. did falsely say, depose, and swear, that, &c. or to the effect following, that, &c. (*n*); or where the evidence is given before a jury or a magistrate *ore tenus*, to aver that the defendant falsely, maliciously, wilfully, and corruptly said, deposed, and swore, that, &c. (*o*). Where the perjury is assigned upon an affidavit, it is usual to allege, deposed and

(*i*) See the Entries in Tremaine, P. C. 139, &c. and Co. Ent. 166, 367. *R. v. Crossley*, 7 T. R. 315.

(*k*) *R. v. Crossley*, 7 T. R. 315.

(*l*) *R. v. M'Carther, Peake*, 155.

(*m*) *Ib.*

(*n*) See the Ind. in *R. v. Aylett*, 1 T. R. 64.

(*o*) Trem. P. C. 139. 150.

118 INDICTMENT.—*Means and Manner.*

swore in writing as follows: that is to say (*p*), &c. or falsely and corruptly said, swore, and deposed, that (*q*), &c.; and then the affidavit must be correctly set out, and a variance which altered the sense would be fatal (*r*). But in some of the older precedents, both the interrogatories and the answers on which the perjury is assigned, are set out in English (*s*).

In an indictment for perjury in an affidavit to hold to bail, it has been held to be unnecessary to insert the jurat (*t*). If the jurat be set forth, and it thereby appear that the affidavit was sworn in another county, the variance will not be (*u*) fatal.

It frequently is necessary, with a view to the subsequent assignment of perjury upon the defendant's statement, to point the defendant's meaning, (when it is too generally expressed), to particular facts and circumstances; this is to be effected by means of an *innuendo*, which may be defined to be,

An averment which explains the defendant's meaning (*x*), by reference to antecedent matter (*y*). It signifies no more than the words "*id est scilicet*," or "meaning," as explanatory of a subject matter sufficiently expressed before, as such a one, meaning A. B. or such a subject, meaning the subject in question (*z*),

(*p*) *R. v. Jole*, Trem. P. C. 139.

(*q*) *R. v. Stone*, Trem. P. C. 148.

(*r*) *R. v. Beech*, Leach, 158. May's case, Leach, and supra, p. 94.

(*s*) *R. v. Brookes*, Trem. P. C. 155. *R. v. Southerton*, lb. 155. lb. 162.

(*t*) *R. v. Emden*, 9 East. 437.

(*u*) *Ib.*

(*x*) Yelv. 21. 1 Cro. 378.

(*y*) *R. v. Alderton*, Say. 280. *R. v. Matthews*, 9 St. Tr. 52. Cowp. 672. 4 Co. 17. 2 Salk. 513. 1 Ld. Ray. 256. Saund. 243.

(*z*) Per De Grey, C. J. Cowp. 683.

And, since this is the proper office of an innuendo, if it go beyond it, and materially enlarge the sense of the words which it is intended to explain, by introducing new matter, it will vitiate the indictment or declaration in which it is used. Thus, the words, he has burnt my barn, cannot, by the mere aid of an innuendo, be extended to mean "his barn full of corn," for that is not an explanation of what was said before, but an addition to it (a).

In Griepes's case (b), it appeared that Mr. Strobe, upon the trial of a replevin cause, proved the execution of certain indentures of lease and release, bearing date the 15th and 16th of July, 1681, at Albemarle-house, in the parish of St. Martin in the Fields, Westminster. Griepes was a witness upon this trial, and the information, charging him with perjury, alleged to have been committed on that occasion, averred, that he swore that Mr. Strobe, meaning the said witness, was commorant all the middle of the month of July, innuendo of the year 1681, at Newnham, *innuendo, Newnham in the county of Devon*; and assigned, by way of breach, that the said E. Strobe was not at Newnham, in the said month of July. The defendant was convicted, and upon motion in arrest of judgment, the judges, after giving the case great attention, delivered their opinions very fully. Lord Holt, C. J. differed from his brethren in some respects, but upon these points they all agreed, 1. that the information would be vicious without an innuendo (c); 2dly, that the innuendo was ill, because

(a) *Ib.* and 4 Co. 17.

(b) Lord Ray. 256.

(c) Rokeby, Turton, and Eyre, Js.; because, without shewing where Newnham was, it would not appear that the

matter sworn was material to the issue. Lord Holt, C. J. considered the question to be material to the issue, wheresoever Newnham was, but since, without an innuendo, it was

it introduced new matter ; and they all held, that an innuendo could not supply a previous defect in certainty ; for an innuendo signifies nothing, unless there be some matter of fact precedent to which it may refer.

And it seems that the information in this case ought to have alleged, in the first place, that the question was, whether Mr. Strode was at Newnham, in Devonshire, at a time specified ; and then the subsequent averment, that the defendant swore that Mr. Strode was at Newnham in Devonshire at that time, would have been proper (*d.*)

Where however the new matter thus introduced is superfluous, the sense being complete without it, the innuendo may be rejected as surplusage. As in the case of *Roberts v. Camden* (*e.*) where the words “ attorney-general ” were alleged to mean the attorney-general for the county palatine of Chester. So in Aylett’s case (*f.*) the indictment alleged, that the defendant did depose and swear, of and concerning the said complainant, to the effect following, to wit, that he the said E. Aylett was arrested on the steps of his own door, and before he had been *within* the door of his house ; innuendo, that he was arrested upon the steps of the *outer door* of the said house, and before he the said E. A. had been within the door of his said house. It was objected, that the innuendo introduced a new idea not warranted by the introductory mat-

uncertain where Newnham was, it could not be intended to be in any county ; and therefore, without an innuendo, he conceived that the breach assigned was ill for uncertainty.

(*d.*) Judgment was arrested on these grounds ; but the court, being satisfied that the defend-

ant was guilty, gave leave to the prosecutor to exhibit a new information ; but the House of Lords saved the prosecutor this trouble, by reversing the judgment of the K. B. without assigning any reason.

(*e.*) 9 East, 83.

(*f.*) 1 T. R. 65.

ter, viz. the *outer door* of his house; but the objection was not allowed, because the innuendo was unnecessary. And the same rule applies where the innuendo is insensible or repugnant (g).

But if any use be made of the *innuendo*, it cannot be rejected as surplusage (h); nor can the defect be cured by verdict, for in Gripe's case the court said, a man's meaning, abstracted from the fact, cannot be put in issue.

And if a place generally mentioned by name, as Newnham, be explained by the innuendo to mean a particular place, as Newnham in Devonshire, then though the breach be general, as that the person was not at Newnham, the breach must be taken to refer to Newnham in Devonshire, the last antecedent; and, therefore, if the innuendo be defective, the indictment will be vicious, even after verdict (i).

In alleging perjury to have been committed in an affidavit in any court, &c. the usual form is to state, that the defendant came before the court, and exhibited the affidavit or paper writing, that court having competent authority, &c.; and that he swore falsely such and such things; without adding, that any use was afterwards made of the affidavit, or referring to the files of the court (k). For the guilt of the party who makes the affidavit, cannot depend upon the subsequent use which is made of it. But where the proceeding is under the statute of Elizabeth, by which an action is given to the party injured by the false

(g) Cro. Car. 512.

(h) *R. v. Gripe*, Ld. Ray, 256.

(i) 2 Ld. Ray. 261.

(k) *R. v. Crossley*, 7 T. R.

315. *R. v. Hawkins*, Trem. P. C. 167. *R. v. Stone*, ib.

148.

122 INDICTMENT.—*Means and Manner.*

oath, it should be shewn, that the affidavit was produced and used against that party (*l*).

And it need not be alleged where the court was holden when the original application was made, nor *when* the rule nisi was made, provided the taking of the false oath be alleged with a sufficient venue (*m*).

The time of taking the false oath need not be stated precisely, unless it be alleged as descriptive of the record. It has been held, that when the indictment has been founded upon perjury committed at the assizes or sittings, the offence may be laid to have been committed either on the first day of the assizes or sittings, or upon the day when the trial really took place (*n*). When an indictment founded upon an answer to a bill in the Exchequer, alleged that the bill was filed on the first day of December, 1807, and upon the production of the bill it appeared to be entitled generally of the preceding Michaelmas term, the objection on the score of variance was overruled, the day not being alleged as part of the record (*o*).

5. *Assignment of perjury.*

The assignment in general consists of express contradictions of the defendant's statement, as explained by the innuendos; and it will be vicious, if it be more particular than the assertion which it is meant to contradict (*p*). Thus, if the defendant swear that A. B. was at Newnham,

(*l*) Holt. R. 534. Skinn. 403. Trem. P. C. 136. *R. v. Jole*, ib. 138. *R. v. Brookes*, ib. 151. 155.

(*m*) *R. v. Crossley*, 7 T. R. 315.

(*n*) Per Abbott, L. C. J. sittings after Trin. T. 1819. and

see *R. v. Hucks*. 1 Starkie Rep. 520. and

(*o*) *R. v. Hucks*, 1 Starkie R. 521. See Post. tit. Variance, *Rastall v. Stratton*, 1 H. B. 49. and the notes to the ind. tit. Perjury.

(*p*) *R. v. Gricpe*, *Ld. Ray.* 256.

the breach averring that A. B. was not at a *particular* place mentioned and known by that name, is faulty; for he might have been at Newnham, though not at the Newnham specified (*q*). The breach in such case ought to be assigned thus, that A. B. was not at any vill known by the name of Newnham; or thus, was not at Newnham aforesaid, or at any ether Newnham (*r*).

III. *Illegal solicitations, attempts, and endeavours.*

In this class of offences it is also in general essential to the validity of the indictment, that the particular means and manner should be set out, in order that the court may see that they amount in law to the crime imputed.

The exceptions to this rule consist of cases, where the means are either perfectly indifferent, provided the criminal object be accomplished, or where they are made up of a number of circumstances, which cannot well be described upon the record without the aid of a general term of art.

And 1st. the general rule is, that the *means should be set out*.

Thus, if words be spoken to a justice of the peace in the execution of his office, the words must be set out as they were spoken (*s*), and it is not sufficient to aver generally, that the defendant spoke divers scandalous, threatening, and contemptuous words.

So in an indictment under 6 & 7 W. 3. c. 11. for profane cursing and swearing, it was necessary to set out the particular oaths and curses; because, as was said in the case of the *King* (*t*) v. *Sparling*, what is a profane

(*q*) *R. v. Grieppe*, Ld. Ray.
256.

(*r*) *Ib.*

(*s*) 2 Str. 699:

(*t*) A general form of conviction is given by the statute
19 G. 2. c. 21. Str. 497.

oath or curse, is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is such.

So in an indictment for blasphemous or seditious words; they must be stated, that the court may judge whether they be seditious or blasphemous (u).

And in all indictments or informations for libels, the libel must be set out in the terms in which it was published (x).

And it would be insufficient to aver merely, that the defendant published a libel *ad effectum sequentem* (y), since the court must judge of the words themselves, and not of the construction which the prosecutor puts upon them. This point was solemnly decided upon the trial of Dr. Sacheverell, for high crimes and misdemeanors, before the House of Lords, upon an impeachment by the House of Commons. Before the opinion of the court had been taken upon the defendant's guilt, a doubt was raised whether the objectionable passages in the sermons which the defendant had preached, and for which he was impeached, should not have been set forth upon the face of the impeachment; and it was proposed to all the judges, *whether by the law of England, and constant practice in all prosecutions, by indictment or information, for crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal, must not be expressly specified in such indictment or information?*

The judges present unanimously answered the whole of this proposition in the affirmative. But the lords afterwards resolved, that they would determine the impeachment, according to the law of the land, and the law and

(u) Str. 498. 686.

(y) 2 Salk. 417. *R. v. Bear*,

(x) 6 T. R. 162. 1 Ld. Ray. 1 Lord Ray. 414. Holt. R. 348. 414. 2 Salk. 417. 3 Mod. 71. 350.

usage of parliament, and that, by the law and usage of parliament, in prosecutions, by impeachment, for high crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal (z), are not necessary to be expressly specified in such impeachment.

It was afterwards contended, that this rule of common law extended to indictments for treason, where the overt act was laid to consist in the publication of letters; but the objection was overruled in *Francia's* (a) as well as in *Layer's* (b) case.

Upon the latter trial, when the objection was pressed, Mr. Justice Eyre reprobated the opinion given by the judges in *Sacheverell's* case, and said, that it was a great surprise to Westminster Hall, and particularly to those who attended the Court of King's Bench, to hear that such an opinion had been given.

There seems, however, to be a wide distinction between indictments for high treason, where written publications are relied upon as overt acts, and indictments or informations in case of libel or perjury; for in the former case, the traitorously imagining or compassing of the king's death, constitutes the offence, and the letters or words are mere evidence of it, the sending or publishing of which certainly may amount to an overt act, though the very words cannot be precisely ascertained; as where letters are sent to a person in open hostility with this country; now, though the statute (c) directs, that the record shall

(z) *Sacheverell's* case. St. Tr. 9 Ann. There is no difference in this respect between a criminal and civil proceeding, where the cause of action arises *en delicto*, per *Ld. Ellenborough*. 3 M. & S. 116.

(a) St. Tr. 3 G. 1.

(b) 6 St. Tr. 330. 9 G. 1.
See *Ld. Preston's* case, 4 St. Tr. 410. 2 W. & M.

(c) 7 W. 3. c. 3.

apprize the defendant of the overt act intended to be proved against him, it does not require a greater particularity, on the record, than is necessary in proof upon the trial, nor does it alter the nature and measure of evidence.

But in case of indictments for libel or perjury, the very words so constitute the offence, that, unless they be set forth, it cannot judicially appear that the defendant is guilty of the crime alleged against him. And Mr. J. Powys, who was one of the judges who were consulted in Sacheverell's case, and who also sate upon the trial of Laver, noticed this distinction on the latter occasion, when it was objected that the treasonable letters ought to have been copied upon the record.

It appears, indeed, that it was formerly not unfrequent in indictments for treason, perjury, and libel, to set out the words in Latin, though published in English (*d*).

But in the reign of Queen Anne the practice was otherwise as to libels, &c. as appears from the answer of the judges in Sacheverell's case, and their resolution seems to be law at this day.

In the case of the Queen v. Dr. Drake (*e*), Lord Holt, C.J. is reported to have said, "A libel may be described either by the *sense* or by the *words*; but, by the chief justice's application of this doctrine (*f*), it appears that he did not mean that a mere description of the words by their *effect* would be sufficient; for he observes, "A libel may be described either by the sense or the words of it, and therefore an information, charging that the defendant made a

(*d*) See Mr. J. Eyre's observations, Laver's case, 6 St. Tr. 331. Hugh Pyne's case, Cro. Car. 117. Dr. Drake's case, Holt, 35.

(*e*) 3 Salk. 234. Holt. R. 347. 349, 350. 425. 11 Mod. 95.

(*f*) Holt. R. 426.

writing containing such words, is good, and in that case a nice exactness is not required ; because it is only a description of the sense and substance of the libel, and if the jury find some omissions, it will be sufficient if *some words be proved* (g).” The latter expression, “ if some words be proved,” renders it probable, that Lord Holt meant to say, not that it is unnecessary to state the words themselves, but that they may be stated two ways, either by their *tenor*, in which case the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with the one set out in the information ; or by stating that the defendant made a writing, containing *inter alia* the words set out ; in which case it would be necessary to set out those only which are material, and a variance would not be fatal, unless the sense were altered.

In the case of *Newton v. Stubbs* (h), the action was brought for words spoken, which were set out in the declaration *ad tenorem et effectum sequentem* ; and after verdict for the plaintiff, judgment was arrested, because it was not expressly alleged that the defendant spoke the very words.

In the case of the *King v. Bear* (i), the indictment was for composing, writing, making, and collecting several libels, *in uno quorum continetur inter alia juxta tenorem et ad effectum sequentem*, and the words were then set out.

And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the *words themselves*, and not of the construction the prosecutor puts upon them ; but that the words *juxta tenorem sequentem* import the very words themselves (k). And it was holden, that the words “*ad effectum*” were loose and useless words :

(g) Holt. R. 426.

(h) 3 Mod. 71.

(i) 2 Salk. 417.

(k) Ib.

but that the words *juxta tenorem* being of a more certain and strict signification, the force of the latter was not hurt by the former, according to the maxim "*utile per inutile non vitiatur*."

In the same case, (*l*) that of *Ford v. Bennett* was referred to; where, in a special action upon the case against Bennett and others, the plaintiff declared that the defendants, at Saltashe, procured a false and scandalous libel against the plaintiff to be written under the form of a petition, and the libel was set out after the words *continetur ad tenorem et ad effectum sequentem*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards upon error brought in the Exchequer Chamber, the judgment was affirmed; the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J. said, that he then thought the judgment to be given with too great precipitation; but that he afterwards, upon great consideration, *had esteemed it to be very good law*. And the *King v. Fuller* (*m*), and the *King v. Young* (*n*), were cited as authorities in point; and the whole court were of opinion, that notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentem*, it had been ill, because it had not imported that the words were *the specific words* which were in the libel.

And *the statement of the words written or spoken must correspond with the publication to be proved* (*u*).

Therefore, an indictment for speaking these words of a magistrate (*y*), "He is a broken down justice," is not satis-

- (*l*) 1 Lord Ray. 415. R. 150. 4 T. R. 217. Cro. Eliz.
- (*m*) Mich. 4 W. & M. 224. But see Dyer, 75.
- (*n*) Ib. (*p*) R. v. Berry, 4 T. R.
- (*o*) B. N. P. 5. cites 2 Roll. 217. *Blisset v. Johnson*, Cro.
- Ab. 18. a. *Avarillo v. Rogers*, Eliz. 503. contra.
- T. T. 1773. 2 East, 434. 8 T.

fied by evidence of the words, "You are a broken down justice." Lord Kenyon, indeed, in this case held, at nisi prius, that it was sufficient to prove the *substance of the words stated*, and the defendant was found guilty; but the point was reserved, in order that a verdict of acquittal might be entered, in case the court should be of a different opinion. On motion to that effect, Buller, J. said, that there was a case in Strange in support of his lordship's opinion; but that it had since been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant.

In the case of *Zenobio v. Artell* (q) judgment was arrested; because a libel published in French had not been set out in the original language, but had been merely described by way of translation; and Lord Kenyon, C. J. upon that occasion observed, that from the uniform current of proceedings, it appeared that the original words should be set forth, with an English translation, shewing their application to the plaintiff.

With respect to variances from omission, it seems in all cases to be sufficient to set out *the words which are material*, and it is not even necessary to state words which may qualify the objectionable ones; and in the case of libel, it may be averred *in uno quorum continetur inter alia, &c.* (r); for if something else were added, which did in fact qualify the objectionable words, it may be given in evidence on not guilty (s).

(q) 6 T. R. 162.

(r) *R. v. Beare*, Holt. R. 350.

(s) 2 Mod. 317: 8 Mod. 329. In Sir J. Sydenham's case, Cro. J. 407. an action was brought

for these words: "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the king too; and he is a maintainer of papistry and rebellious per-

In the different reports of the case of the *Queen v. Drake*, a distinction is made between cases where the libel is set out *juxta tenorem*, or in *hæc verba*, and where it is set out under an *inter alia* : but there seems to be little distinction between them, since, under the latter averment, some of the words must be proved as laid, and

sons." The defendant pleaded, that he spake other words, *absque hoc*, that he spake these. The jury find that he spoke these words : " *I think, in my conscience, if Sir John Sydenham,*" &c. and found all the other words verbatim, and conclude *si super totam materiam*, he spake the words *forma qua* the plaintiff declared, they find for the plaintiff to his damage of 160 marks, if otherwise, for the defendant. And three of the judges, Montague, C. J. Croke, and Dodderidge, J. held, that the plaintiff was entitled to judgment, since the other words found were not words of extenuation or alteration of the sense of the former words, but rather enforced them, and that there was no cause to stay the plaintiff's judgment.

For though the plaintiff declared of fewer words than the defendant spake, yet he declaring truly that the defendant

spake those words, upon the evidence it appears that he spake these words which are actionable; and the words added, diminish not, nor are an alteration of the sense of the words whereof he declares; wherefore, although the issue be specially found, yet the plaintiff shall have judgment.

The fourth judge (Houghton) was of opinion, that the omission of part of the words proved, though the sense was unaltered, was a fatal variance.

A writ of error was afterwards brought upon this judgment, and one ground of error assigned was, the variance between the words declared upon and proved; and of this opinion were Hobart, C. J. of the Common Bench, Winch, and Denham; but Tanfield, Chief Baron, Warburton, Bromley, and Hutton, were of a contrary opinion, whereupon the judgment was affirmed.

any variation from the sense would be fatal. It is to be observed too, that the word *tenor* does not necessarily imply an undertaking to set out a copy of the whole publication without any addition or diminution whatsoever, since it has been holden, that neither the mis-spelling of a word, by the addition or omission of one or more letters (s), nor even the addition of several superfluous words, will constitute a fatal variance (x).

If the additional words proved be altogether unimportant, their insertion would have been nugatory; if their effect be to alter the sense of the part already set out, the defendant will have the advantage of it by giving it in evidence under the general issue.

One count of a declaration stated the words of a libel as follows: "My sarcastic friend, by leaving out the repetition or chorus of Mons. T's poem, greatly injures the *tout ensemble*, or general and combined effect." The words proved in evidence were "My sarcastic friend, ΜΕΡΟΣ, by leaving out," &c. And it was holden by Lord Ellenborough, C. J. upon trial of the cause, that there was a material variance between the libel declared upon in that count and the libel proved, and that the plaintiff was not entitled to recover on that count.

But though it is not necessary to state the whole of a libellous publication, yet, if the most offensive parts be selected, the passages which are not continuous in the original must not be set out continuously in pleading, since any alteration of the sense arising from such new arrangement would be a ground of nonsuit (x).

(t) Hart's case, Leach, 172. (u) Elizabeth Dunn's case, R. v. Beech, Leach, 158. May's Leach, 68. East. P. C. 962. case, Leach, 227. See Haw. 8 Mod. 329. Vide supra, 93, P. C. c. 46. s. 190. Salk. 660. 94.
R. v. Bear, Holt. R. 350. (x) 1 Camp. 350.

The correct mode of setting out two selected passages in the same count, is by saying, "In a certain part of which said libel there was and is contained, &c. and in a certain other part of which said libel there was and is contained," &c. (y).

With respect to the alteration of a single letter, the rule seems to be, that if the sense be thereby altered, the variance will be fatal, but not otherwise (z).

When the libellous quality is derived from circumstances extrinsic of the words, the connection with those circumstances must appear.

The technical mode of effecting this is, by first stating in the introductory part of the indictment those extrinsic facts, by reference to which the writing becomes criminal; secondly, averring generally, that the libel related to those facts; and, thirdly, connecting, by innuendos, such parts of the publication as want explanation, with the introductory facts previously exhibited upon the record.

In the *King v. Horne* (a), De Grey, C. J. observed, "In the case of a libel, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the record, by way of introduction if it is new matter, or by way of innuendo if it is only matter of explanation. For an innuendo means no more than the words "*id est*," "*scillicet*," or "meaning," or "aforesaid," as explanatory of a subject matter sufficiently expressed before, as such a one, meaning the defendant, or such a subject, meaning the subject in question.

If the innuendo materially enlarge the sense of the words, it will vitiate the indictment.

(y) *Ib.* per Lord Ellenborough.

Case, Leach, 172. Doug. 194. 3 Salk. 224.

(z) *R. v. Beech*, Leach, 158. 2 Haw. c. 46. s. 190. Hart's

(a) 2 Cowp. 683. Vide *supra*, 109, tit. Perjury.

In the case of the *King v. Alderton* (b), the alleged libel was contained in an advertisement, reciting certain orders made for collecting money, on account of the distemper among the horned cattle, advertised by the clerk of the peace for the county of Suffolk; and it charged, that by these orders the money collected had been improperly applied. The information stated this to be a libel upon the justices of Suffolk. In the body of the libel it was not said, "by the order of the justices," nor did the information, in the introductory part, say that it was a libel of and concerning the justices of Suffolk. But when the information came to state any of the orders in the advertisement, it added this innuendo, "meaning an order of the justices of peace for the county of Suffolk;" but these innuendos could not supply the want of an averment in the introductory part, of its having been written "of and concerning the justices," because they were not explanatory of, but in addition to the former matter. And the court were of opinion, that the information having omitted the words "of and concerning the justices," in the introductory part, such omission was fatal, and judgment was accordingly arrested.

In the case of *Hawkes v. Hawkey* (c) it was decided that where the introductory matter has been properly stated, it is necessary to connect the whole publication with it, by means of a general averment that it related to

(b) Say. R. 280. This case is not correctly reported in Sayer. See L. C. J. De Grey's account of the same case in *R. v. Horne*. 2 Cowp. 683. see also *R. v. Marsden*, 4 M. & S. 163. where it was held that the omission to allege that the libel

was published of and concerning W. S. (the prosecutor) was not supplied by the introductory allegation, that the defendant intended to vilify W. S. and by the innuendo's pointing out W. S. as the person meant.

(c) 8 East, 427.

such previous matter, and that it was not sufficient to do it by means of an innuendo only.

Upon motion in arrest of judgment, Lord Ellenborough, C. J. was of opinion, that it might be collected from what Lord C. J. De Grey said, in *Barham's case* (d), that he conceived an introductory averment that the defendant had a barn full of corn, and also an averment that the defendant spoke the words in a discourse concerning that barn, necessary to warrant the innuendo—"my barn full of corn." His Lordship added, "If a broad rule has been laid down as to the mode of declaring, in this species of action, whether properly laid down or not in the first instance, it is better to abide by it than to attempt making nice distinctions. The only peculiarity in this case which is relied upon, as distinguishing it from the current of authorities, is the preliminary matter averred respecting the fact of the plaintiff having put in his answer to the bill filed in the exchequer; and the question is, whether the innuendo alone will refer the words spoken to such introductory matter, so as to make it necessary for the plaintiff to prove any thing which he must have proved had a colloquium been laid; the case of *Savage v. Robery* seems to shew that it will not."

And the court (e), after considering the case of the *King v. Horne*, gave judgment for the defendant.

In many instances, however, an innuendo will not vitiate the proceedings, though new matter be introduced.

As, where the matter is superfluous, and the cause of action complete without it.

The plaintiff alleged (f), that the defendant addressed these words to him, "Thou art a rogue and a rascal, and hast killed thy wife;" innuendo, one Elizabeth, late wife

(d) 4 Co.

(e) Cowp. 660

(f) *Wilner v. Hold*, Cro. Cas. 489.

of the plaintiff. And the plaintiff had judgment, though the declaration contained no prefatory averment that the wife was dead.

So, where the words were laid (g), "Thou hast robbed the church," (innuendo the church of St. Alphage), no objection was taken.

In *Craft v. Boite* (h), the words, as laid in the declaration, were, "He" (meaning the plaintiff) "hath stolen two hundred pounds worth of plate out of Wadham College," (meaning a college called Wadham College, in the university of Oxford), though the declaration contained no previous averment of Wadham College, in the university of Oxford (i).

In *Roberts v. Camden* (l), the defendant said, "He" (meaning the plaintiff) "is under a charge of a prosecution for perjury. G. W. had the attorney-general's directions to prosecute;" and an innuendo that the attorney-general for the county palatine of Chester was meant, was rejected as surplusage.

It does not, in any case, appear to be necessary, that the innuendo should in terms state the legal inference which is to be drawn from the publication, as connected with the facts stated, its office seems more properly con-

(g) 4 Cro. J. 153. 1 Vis. Ab. 512.

(h) 1 Will. Saun. 243.

(i) It is suggested by the learned editor of Saunders's Reports, that the innuendo is on such account improper; the objection, however, appears to be rather of form than of substance; and probably such a declaration would be held good

on general demurrer or after verdict, since the gist of the action is the charge of stealing from Wadham College, which is entirely unconnected with the situation of the college in the university of Oxford, so that the innuendo might be expunged without affecting the cause of action.

(l) 9 East, 83.

finer to mere reference of the defendant's meaning to previous matter; and, indeed, such an averment would be improper, since the criminal nature of the charge is a matter of law, which the court will collect from the facts, if they warrant such a conclusion; and if they do not, no innuendo of their legal effect will avail to render them actionable.

Thus, where, from the circumstances, it appears upon the whole that the defendant intended to impute a charge of wilful murder, it is unnecessary for the plaintiff to assert, by way of innuendo, that the defendant meant to impute the very crime of murder (*m*).

The mode of using these averments may be collected from the following instances.

In an information against Clerk (*n*), for publishing a libel in "Mist's journal," it was shewn by proper averments and innuendos, that in a pretended piece of Persian history, the king, and several other members of the royal family had been libelled, and that the king was represented under the name of Mireweis, the queen under that of Sultana, and that the character of the young Sophi was intended for the pretender.

In Baxter's case (*o*), it was shewn, that by the word bishops, the bishops of England (*p*) were meant. In the *King v. Franklin*, that by "ministers," were meant the ministers of the King of England (*q*).

In an action for charging the plaintiff with having said, that he could see no probability of the war's ending with France, until the little gentleman on the other side of the water (innuendo the Prince of Wales) was restored to his

(*m*) 1 Cowp. 275.

(*n*) Barnard, K. B. 304.

(*o*) 3 Mod. 69.

(*p*) 3 Bac. Ab. 454.

(*q*) 11 Mod. 99.

rights, the court held, that this was certain enough even without an innuendo.

In Tutchin's case (*r*), the introductory part of the information stated, that the libel was written concerning the royal navy of this kingdom, and the government of the said navy. One part of the libel was, "The mismanagements of the navy" (innuendo the royal navy of this kingdom) "have been a greater tax upon the merchants than the duties raised by parliament." And it was holden, that "the navy" was well connected, by means of the innuendo, with the royal navy mentioned in the introductory part.

In the *King v. Mathews* (*s*) the information in the introductory part charged the libel to have been written "Of and concerning the Pretender, and concerning his right to the crown of Great Britain."

The words of the libel were, "From the solemnity of the chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." And it was holden, that the innuendo's in the body of the libel, explaining the words to mean the pretender, and his hereditary right to the crown of Great Britain; were, when connected with the previous averments, sufficient to verify the charge.

In the *King v. Horne* (*t*), the libel, as stated in the information, was averred to be of and concerning his said majesty's government, and the employment of his troops. The libel, as set forth in the information, advertised a subscription for "the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects; who, faithful to the character of Englishmen, and pre-

(*r*) 5 St. T. 528. 3 Ann.
1704.

(*s*) 9 St. Tr. 682.
(*t*) Cowp. 682.

ferring death to slavery, were, for that reason only, inhumanly murdered by the king's" (meaning his said majesty's "troops, at or near Lexington and Concord, &c. in the province of Massachusetts." The defendant having been found guilty, objected in arrest of judgment, that there was no averment as to the state of the Massachusetts colony at that time, or that the king had sent any troops there, or that the employment of the troops was, by the king's authority.

Lord C. J. De Grey, in giving judgment, observed, "The words in the present case are, that the defendant, of and concerning the king's government and the employment of his troops, said, 'that innocent subjects had been inhumanly murdered by the king's troops, for preferring death to slavery.' Do these words import, in their natural and obvious sense, that the king's troops were employed by the act of government inhumanly to murder the king's innocent subjects? There can be no doubt but that the king's government comprehends all the executive power, both civil and military, that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the subject of the writing in the present case was, 'the troops, and the king's troops, and the business they had done.'

"It has been truly said, that the king's troops may like other men, act as individuals, but they can be employed as troops by the act of government only. If the averment, therefore, amount to this, that in the discourse which was held, the words were said 'of and concerning the king's government;' the natural import appears to us to be this: 'I am speaking of the king's administration, of his government, relative to his troops, and I say, that

our fellow subjects, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the king's order, or the orders of his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently of the imputation itself, because it arraigns the government of a breach of public trust, in employing the means of the defence of the subject in the destruction of the lives of those who are faithful and innocent."

"As to any other circumstances not stated in the information, if those which are stated, do of themselves constitute an offence, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred on the record."

The *general rule* having thus been established, the exceptions to it are next to be considered.

And 1st. where the means are indifferent, provided the end be accomplished, such means may be described in general terms.

In the cases of high treason, of petit larciny, and of misdemeanors, which do not amount to felony, those who are not present when the fact is committed, but who previously advise, counsel, or by any means procure the commission of the crime, seem to be identified in every respect with those who actually perpetrate the offence, and may be described as principals in the indictment or information. But in all felonies, with the exception of petit larciny, one who is not either actually or constructively present, but who procures, by his solicitation, advice, or direction, the commission of the felony, is guilty, not as a principal, but as an accessory before the fact, and it is sufficient to aver, in general, that he did

140 INDICTMENT.—Means and Manner.

incite, move, procure, and abet, &c. (u). But then it is a well known rule of law, that an accessory cannot in general be convicted before the principal has been convicted, and it is usual and proper to charge the accessory in same indictment with the principal (x),

And in such case, after describing the offence of the principal, it is sufficient to aver that the said C. D. did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said A. B. to commit the said felony.

Where the accessory is indicted after the conviction of the principal, it is not necessary, at common law, to aver in the indictment, that the principal committed the offence; it is sufficient to recite, with proper certainty, the record of the conviction; and this sufficiency is grounded upon the legal presumption that every thing in the former proceeding was rightly and properly transacted (y).

But where the indictment, under the statute (z), charges a person in one county, with procuring a murder to be committed in another, it should not merely recite that the principal was indicted in the other county, because that is no express allegation that the principal committed the murder; but it should aver, that the principal did commit the murder in the other county (a). And in such case the indictment should first describe the offence to have been committed by the principal, in the same form as in an indictment against the principal, only lay-

(u) *Sanchar's case*, 9 Co. 114.

(x) *Fost.* 365.

(y) *Ib.*

(z) 2 & 3 E. 6. c. 24.

(a) *Lord Sanchar's case*, 9 Co. 114. where this point seems to have been decided upon ma-

ture deliberation, and is said to have been authorised by many precedents. See also the case of the Earl and Countess of Somerset, 1 St. Tr. 351. 3 Ins. 49.

ing it in the *second county* (*b*) according to the fact, and should then proceed to aver that the accessory, on, &c. at, &c. the said R. C. to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his malice aforethought, did stir up, move, abet, counsel, and procure against the peace, &c.

If A. command B. to commit a felony, and B. associate C. with himself in the commission of the felony (*c*), it is proper to charge A. as accessory to B. only; but if he be charged as accessory to B. and C. he may be convicted on proof that he was accessory to B. alone (*d*). A man may be both principal and accessory to the same felony; as if A. command B. to kill C. and afterwards assist him in the fact, he may be so charged in the indictment (*e*). And if A. command B. to commit a robbery, and B. procure it to be committed by the agency of D., A. also is an accessory before the fact; and in such case it seems that A. may be indicted directly as accessory to D. (*f*). In case of felonies, created or punished by particular statutes, accessories before the fact are frequently described by particular words, which ought to be used in framing indictments against them. Yet it has been holden (*g*), that an indictment against one, as accessory before the fact to a murder, which alleged that he did maliciously excite, move, and procure, was sufficient to

(*b*) 3 Ins. 49.

(*d*) Lord Sanchar's case, 9

(*c*) Ld. Sanchar's case, 9 Co. 114. See the case of M'Daniel and others. Fost. 121. Lord and Lady Somerset's case, 1 St. Tr. 351. 2 Haw. c. 29. s. 51. Fost. 125.

Co. 114.

(*e*) 2 Haw. c. 29. s. 1. 7 H. 4. 27. F. Coron. 80. 176. 285.

(*f*) Fost. 125. 361. 9 Co. 114. 3 Ins. 49.

(*g*) Lodowike Grevil's case, And. 195. Fost. 130.

oust the offender of his clergy, under the stat. 4 & 5 Ph. & M.; the words of which are, "maliciously command, hire, or counsel," since the counselling of another is necessarily included in the exciting, moving, and procuring. And Mr. Justice Foster approved of the decision (h), although he observes, that it is the only precedent he knew, in which the words of the statute had been totally dropt; and he said, that he the rather inclined to that opinion, because the legislature, in statutes made concerning accessories before the fact, have not confined themselves to any certain mode of expression, but have used a great variety of words all terminating in the same general idea.

In the above class of cases, where the solicitation has been followed by the consummation of the crime, no doubt seems to have been entertained as to the sufficiency of a description by means of the general words above alluded to.

This sufficiency rests upon two grounds; in the first place, the adequacy of the means of procurement, is a *mere question of fact* for the cognizance of the jury, and since *any means* are sufficient to render the procurer criminal, it would afford no further information to the court to set them out.

Thus, if A. procure B. to murder C. it is perfectly immaterial whether he effected his purpose by working upon one passion or another, whether he stimulated his avarice or incited him to revenge; whatever mode of persuasion he adopted, he would still be a procurer, and the stating the means upon the record would still leave the question entirely to the consideration of the jury, whether the defendant did procure or not, a fact conclusive as to the adequacy of the means. In the se-

(h) Post. 130.

cond place, since the means of persuasion and solicitation must frequently be of a complicated nature, it would lead to great inconvenience and prolixity if they were always to be described upon the record.

In the preceding class of cases, the end is supposed to have been accomplished; but frequently the offence consists in the mere solicitation, or other attempt to procure the commission of a crime, which is not afterwards perpetrated; and here, since the offence rests in *tendency* only, a greater degree of particularity appears to be necessary in stating the *means*, for by those alone can the defendant's criminality be tried, since their adequacy is not shewn on the record by an averment that they did produce the criminal effect.

And in general, in case of libel, as has already been seen, the instrument itself must be set out in the indictment.

So in the case of a threatening letter, or the speaking of blasphemous or seditious words (i), which fall within the rule as laid down by the judges in Sacheverell's case. And the same general reason applies to all these cases: the means must be set out to enable the court to determine, whether they could constitute the offence imputed; since what amounts to a libel, what constitutes a threatening letter under the statute, what words are punishable

(i) Under the st. 6 & 7 W. 3. c. 11. it was necessary, in a conviction, to set forth the particular oaths and curses used; but in the stat. 19 G. 2. c. 21. a general form is given, which renders it unnecessary to set forth the particular words. In indictments against defendants for neglecting to take the

oaths of allegiance, &c. it has frequently been holden necessary to insert the oaths neglected to be taken; but the reason of this nicety is not very obvious, all that appears to be essential, is to specify the particular oath omitted to be taken.

as being blasphemous and seditious, are questions of law, and ought, in every case, to undergo a judicial examination.

There are, however, many instances in which, though the crime rest in *tendency* only, it may be described by general words, without specifying the means; this happens when the offence is a conclusion of fact arising from a variety of circumstances incapable of any precise definition. These, therefore, are to be regarded as exceptions to the general rule, from the necessity of the case.

It seems formerly to have been holden, that a mere solicitation, not followed by any act, was not an indictable offence.

In the case of *the Queen v. Daniel* (*k*), who was indicted for procuring, enticing, persuading, and causing an apprentice to depart from his master's service, Lord Holt held, that the advising one to rob or kill, without something done thereon, would not be indictable, though it might be otherwise of a conspiracy to rob or kill. But the same learned judge seems, in some degree, to have changed his opinion the same term, for he is reported to have intimated, on the last day of that term, that he was not satisfied whether to entice an apprentice to leave his master was an indictable offence; but that to persuade him to embezzle his master's goods was indictable. Yet it appears, on the face of the report, that even in the latter case he was doubtful whether it was not necessary to allege that the apprentice had embezzled the goods (*l*). And in the subsequent case of *the Queen v. Collingwood* (*m*), the court were of opinion, that an entice-

(*k*) 6 Mod. 101.

(*l*) 6 Mod. 101.

(*m*) 6 Mod. 289. 3 Salk. 42.

2 Ld. Ray. 1118. See *R. v. Sutton*, Str. 92. and Vin. Ab. Ind. A. 4.

ment is not criminal without *something* done in pursuance of it.

But in the case of *the King v. Lady Lawly* (*n*), the indictment charged that the defendant, knowing that J. C. was indicted for perjury, *endeavoured* to keep away a material witness for the king, on which there was judgment for the crown.

In the case of *the King v. Schofield*, the attempt of the defendant to set fire to his own house was holden to be a misdemeanor (*o*). And a case was cited which had been tried before Baron Adams, at Shrewsbury, where the indictment charged the defendant with an attempt to suborn one to commit perjury, which, upon reference to the judges, was unanimously holden to be a misdemeanor. So it was ruled in Johnson's case, where the defendant solicited a witness to commit perjury (*p*).

So in the case of *the King v. Plympton* (*q*), the promising money to a member of a corporation to induce him to vote for the election of a mayor, was holden to be indictable.

So in the case of *the King v. Vaughan* (*r*), an indictment was supported against the defendant for attempting to bribe the Duke of Grafton, who was then a cabinet minister and a member of the privy council, to give the defendant a place in Jamaica.

In a recent case, *R. v. Higgins* (*s*), the defendant was charged with the *soliciting and inciting* of one I. D. a servant of J. P. to take, embezzle, and steal, a quantity of his master's goods; and, after conviction, it was objected for error, that no offence was sufficiently alleged on the

(*n*) Fitzgib. 263.

(*o*) Cald. 397.

(*p*) 2 Show. 1.

(*q*) 2 Ld. Ray. 1377.

(*r*) Burr. 2494.

(*s*) 2 East, 4.

face of the indictment; and it was contended, that a mere intent to commit a crime, was not indictable; and an attempt was made to distinguish the case from some of those above cited, on the ground that no act had been done in pursuance of the unlawful intent; and many cases were quoted for the purpose of shewing, that a mere intent without any act was not indictable; but the court held, that this argument was a mere fallacy, for that the solicitation itself was an act. And Lawrence, J. said, that he had seen similar indictments,—one of *the King v. Broom*, in Northumberland, when at the bar, and another against Guy, and another drawn by Mr. Justice Ashurst for soliciting one to kill the Chevalier D'Eon.

With respect to the description of the *solicitation or endeavour*, it seems that general words are sufficient, because the *endeavour, attempt, or solicitation*, is in general made up of a number of petty circumstances, which cannot be set out on the record.

Therefore, though some of the old indictments for endeavouring to suborn, state an offer of money (t), yet it has been deemed sufficient to charge an endeavour to suborn generally, without stating the means. So in an indictment for endeavouring to keep away a witness (u).

Tilley (x) was indicted under the stat. 16 G. 2. c. 31. against "aiding and assisting prisoners to attempt to escape out of lawful custody;" the indictment stated, that the defendants were aiding and assisting one Isdaile Idswell, then and there being a prisoner, &c. After conviction, though a motion was made in arrest of judgment, on account of an informality in the indictment, it was not ob-

(t) Trem. P. C. 168, 174.

(x) Tilley's case, Leach,

(u) Fitz. 263. See also Ld. 759.

Ray. 1377.

jected that the means used by the defendants, in aiding and assisting, ought to have been specified.

So under the stat. 23 G. 3. c. 13. against enticing artificers out of the kingdom, it is sufficient to aver, generally, that the defendant did contract with a certain artificer to go out of this country, (y) &c.

The defendant Fuller (z) was indicted under the stat. 37 G. 3. c. 70. which enacts, that "any person who shall maliciously and advisedly *endeavour* to seduce any person or persons serving in his Majesty's forces, by sea or land, from his or their duty and allegiance to his majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practices, &c. shall, on being legally convicted of such offence, be adjudged guilty of felony without benefit of clergy."

The first count in the indictment averred, that the defendant did feloniously, maliciously, and advisedly *endeavour* to seduce Matthew Lowe, he the said Matthew Lowe then and there being a person serving in his Majesty's forces by land, from his duty and allegiance to his said majesty. The second count stated, that he did feloniously, maliciously, and advisedly, *endeavour* to incite and stir up the said Matthew Lowe, he the said Matthew Lowe then and there being a person serving in his said Majesty's forces by land, as aforesaid, to commit an act of mutiny, and to commit traitorous and mutinous practices. After conviction, it was moved, in arrest of judgment, that the indictment ought to have stated *the means* by which the prisoner had endeavoured to seduce Matthew Lowe from his duty and allegiance, as charged in

(y) Myddleton's case, 6 T. R. 739.

(z) *R. v. Richard Fuller*, Leach, 916.

the first count, and to incite him to commit an act of mutiny, and traitorous and mutinous practices, as charged in the second count; but the judges were unanimously of opinion, that the case was similar to those of indictments for conspiracies, where the offence is holden to be sufficiently described by the words, "conspire, maintain, aid, and abet," without shewing in what manner, and by what means, the conspiring, maintaining, aiding, and abetting were produced; and that, as an endeavour to seduce, to intice, and to stir up, is a conclusion of fact arising from a variety of circumstances, which in itself is not capable of any precise definition or description, the fact is fully and only capable of being expressed by the word *endeavour*.

It is to be remarked, that the preamble of the statute, upon which the indictment was founded, recites, that "divers wicked and evil disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, had of late industriously endeavoured to seduce persons serving in his Majesty's forces, by sea and land, from their duty and allegiance to his majesty, and to incite them to mutiny and disobedience." And yet the indictment did not, in either count, specify whether the endeavour was made by these means, or by either of them.

In the case of *the King v. Higgins* (a), above alluded to, the indictment charged, that the defendant did solicit and incite one James Dixon, a servant of J. Phillipa, to take, embezzle, and steal, a quantity of twist, of the goods and chattels of his master; and, upon this indictment, the judgment of the court below was affirmed upon a writ of error.

Where a defendant is indicted for a misdemeanor, committed by the soliciting another to do that, which, if done, would amount to a felony, and render the defen-

(a) 2 East, 5.

dant, as an accessory before the fact, also guilty of felony, it is unnecessary to negative the commission of the felony, for it cannot be intended that a felony (b) has been committed where none is charged.

IV. *Offences consisting of misconduct in office; as by extortion, or other breach of duty, &c.*

In an indictment against a person, or body of persons, for misconducting themselves in office, whether the offence consist in misfeasance or nonfeasance, it is essential to set forth the particular instance of misconduct, with its circumstances. Hence it is sufficient to allege against a constable, generally (c), that he conducted himself improperly and negligently in the execution of his office. In the case of *the King against Hollond and others* (d), who were officers in the service of the East India Company, the indictment charged them with malversation in office; one count set forth a letter, requiring them to commence and prosecute war against Tippoo Sultaun with all possible vigour and decision, and then alleged, by way of breach, that the defendant Hollond did not commence and prosecute war against Tippoo Sultaun with all possible vigour and decision. The court, upon demurrer, held, that this count was defective, because it did not communicate to the defendant what was meant to be proved against him upon the trial.

And the court, in the same case, were of opinion, that every fact material to constitute guilt, should be alleged with averments of time and place.

Where an officer, under colour of his authority, extorts money or other property, it seems to be proper to set out the circumstances with a considerable degree of precision; for though in *Cover's case* (e) it was holden, that an in-

(b) *R. v. Higgins*, 2 East, 5.

(d) 5 T. R. 607.

(c) *R. v. Winteringham*,

(e) Sid. 91. Keb. 357.

Str. 2.

dictment, alleging generally that the defendant extorted a sum of money *colore officii* (f), was sufficient after verdict, yet this was afterwards denied by Lord Holt to be law; for a verdict cannot render a charge more extensive, and, consequently, cannot cure a defect of that nature. It appears to be necessary, or at all events advisable, in an indictment of this kind to aver, that the defendant, being such officer, *took and received* a specified sum of money, or other property, into his own possession; for merely to say, that he compelled a party to pay or deliver it, does not seem to be sufficiently certain (g). And to aver, that he took it under *colour of his office and extorsively*; for Lord Holt and some of his brethren were of opinion, that the word *extorsive* was as essential in that offence as *proditorie* in treason, or *felonice* in felony (h). Yet in actions against officers, to recover penalties for taking greater fees than are by law allowed, it does not seem to be essential to introduce the word, unless it be used in the statute. It is also necessary to aver for what he took it, as that, being a gaoler, he took it for charging A. B. a prisoner in his custody, with an action at the suit of J. S. brought to recover, &c. (i); for shewing ease and favour to A. B. a

(f) One who has acted in an office, cannot, although he has been informally appointed, be charged with extortion, under pretence and colour of being such officer. *R. v. Dobson*, 7 East, 218.

(g) *R. v. Baines*, 2 Ld. Ray. 1265.

(h) Salk. 600. Ld. Ray. 1265.

(i) In the case of *the King v. Broughton*, Trem. P. C. 111. the indictment alleged, that the defendant being keeper of the king's prison of the gate-house, at Westminster, under colour of her office, unlawfully, unjustly, and extorsively, exacted, received, and took the sum of 2s. 4d. from E. O. for charging A. H. with an action at the

prisoner in his custody (*h*); for executing his duty as coroner (*l*); for writing the probate of a will, (*m*) &c.; and this appears to be necessary, whenever the indictment is founded on a statute which interdicts the taking of fees by an officer for the performance of a particular duty, or which limits the amount of his fee. And in other cases, where it can be clearly shewn under what pretence the money was extorted, it seems to be proper to aver it. But notwithstanding the dictum attributed to Lord Holt in *Salkeld* (*n*), it does not appear to be in all cases essential to set forth the pretence.

For besides the authority of Cover's case, as reported in *Siderfin* and *Keble* (*o*), it appears, that in the very same term the case of the *King v. Atkinson* (*p*) and another was decided in the Queen's Bench. The indictment alleged, that the defendants, being collectors of several sums assessed upon the inhabitants of, &c. by colour of their office, exacted, received, and had, of one T. C. of L. the sum of 4*s.* without alleging, that they pretended that such sum had been assessed upon them. The defendants demurred, and contended that the indictment was vicious for a misjoinder, but the objection was overruled; and it was never contended, that the indictment ought specially to have alleged the pretence. So there is a precedent in West of

suit of E. O. for the sum of 200*l.*

And in another count, that the defendant unlawfully, unjustly, and extorsively exacted, received, and took, &c. from one H. M. the sum of two guineas, for ease and favour, and for relieving one B. D. from his irons, being then a prisoner in the said prison, and in the custody of the said defendant,

detained for a felony and murder by the said B. D. lately and then supposed to have been committed.

(*h*) *R. v. Broughton*, Trem. 111.

(*l*) West. Pr. sec. 108, 109.

(*m*) West. Pr. sec. 111.

(*n*) *R. v. Baines*, Salk. 680.

(*o*) Sid. 91. Keb. 357.

(*p*) *Ld. Ray*. 1248.

52 INDICTMENT.—*Means and Manner.*

an indictment against an escheator's servant, which alleges *generally*, that he broke and entered a certain dwelling-house, and under colour of his office seized and carried away certain skins against the form of divers statutes (q). And whenever the extortion is effected by means of a general assertion, that the sum is due to the officer in respect of his office, the means must of necessity be generally alleged in the indictment. And the distinction seems to be between those cases where the extortion may be committed generally, and those where the taking is prohibited by a statute in respect of some particular duty; for, in the latter case, it is of course essential to shew that the demand was made in respect of that duty; and, therefore, in Lindly's case (r), in an information against the defendant, who made an extortionate demand for making a warrant upon *capias ad satisfaciendum*, it was holden to be insufficient to aver, that he did it *colore officii*, and that it should have been shewn to whom the *capias* was directed, &c.

Finally, it should be shewn, with certainty, *how much* was extorted. In the report of Baynes's case, in Salkeld (s), Lord Holt, and the six justices who agreed with him, held, that the charge should have been, either that 1s. was his fee, and that by colour of his office he took 1s. or generally, that by colour of his office, he extorsively took 8s.

And in most of the precedents of indictments for this offence, it is either averred, that nothing was due to the defendant, or as in the case of Atkinson and another above alluded to, that the defendants, being collectors of certain sums assessed, exacted, &c. from one T. C. being in no wise assessed by virtue of the act of parliament afore-

(q) West. Pr. ecc. 110, and
see *R. v. Lake*, 3 Lev. 268,

(r) Hutt. 70.
(s) Salk. 680.

said (t). But where the taking is manifestly unjust and unlawful, as where the taking of any fee for performing a particular duty is wholly prohibited by a statute, it does not appear to be essential to aver that nothing was due, because the law will intend it (u).

But where the officer is entitled to one fee, and extorts a greater, then the indictment ought to shew the excess in which the extortion really consists; for, where something is really due, it seems to be improper to allege, that the *whole* was wrongfully extorted, and since, according to a well-known rule in pleading, the extent of the offence ought to be shewn, it appears to be necessary to allege, how much was really due, and how much the defendant took (x); and, in such case, it seems that a variance upon the trial would not be material, provided it were shewn that the sum actually taken exceeded that alleged and proved to be allowed by law (y).

And this rule extends to all cases of illegal imposition or exaction: thus, in the case of the *King v. Flint* (a), the indictment against the defendant, for making leaves of unlawful weight, alleged, "*debitum pondus minimis habens*;" and, it was holden to be insufficient, for not shewing what the *debitum pondus* was, and how much was wanting.

Of a nature similar to the last, is the offence of a private person who extorts money by threat of legal process. In

(t) See also West's Tr. s. 108, 109. *R. v. Broughton*, Trem. 111. Ld. Ray. 1265. *R. v. Loggen*, Str. 73. *R. v. Lake*, 3 Lev. 268.

(u) See also West's Pr. s. 108, 109. *R. v. Broughton*, Trem. 111. and *R. v. Loggen* and another, Str. 73. (y) See *R. v. Gilham*, 6 T. R. 265. and *R. v. Baynes*, Ld. Ray. 1265. West. Pr. sec. 111.

(z) Salk. 687. Ld. Ray. 442.

(x) *R. v. Baines*, Salk. 680.

the case of the *King v. Southerton* (a) it was holden, that the threatening by letter, or otherwise, to prosecute for penalties under a statute, for the purpose of obtaining money to stay the prosecution, was not an indictable misdemeanor at common law, although the indictment alleged that money was actually obtained, but that the offence was indictable under the statute.

It has already been seen, that in an indictment for sending a threatening letter, which is a capital offence, whether money or valuables be extorted by it or otherwise, the letter itself must be set out, to (b) enable the court to judge whether the latter is within the statute. But with respect to other attempts to extort or exact, it does not seem to be essential to set forth the very words in which the illegal demand was made.

In case of a criminal omission to perform a duty, it is necessary to set out the circumstances of the default; as in an indictment against a parish for not repairing an highway, or against a county for not repairing a bridge, it is necessary, by proper averments, to shew where the highway or bridge are situated, and that they are in an unfit state to be used by the public; and it has been holden necessary, in indictments for not repairing an highway, to state the extent of the evil complained of, by setting forth the length and breadth of the road out of repair (c).

V. *Illegal Combinations and Conspiracies.*

In an indictment for a conspiracy it is usual to allege, that the defendants unlawfully and wickedly did conspire, combine, confederate, and agree together, to effect the

(a) 6 East, 126. See also *R. v. Woodward*, 11 Mod. 137. 169. *R. v. Loyd*, East. P. C. 976.

(b) *Girdwood's case*, Leach, (c) 1 Haw. c. 26. s. 88. Cas. temp. Hard. 106, 316.

criminal design; and afterwards to allege, that the said defendants, in pursuance of the said conspiracy, combination, confederacy, and agreement, did certain acts set forth in the indictment (*d*). And in such cases it seems, that the general averment that the defendants did *conspire*, &c. to accomplish an object *apparently criminal*, is sufficient, without shewing in what manner and by what means (*e*) the conspiracy, &c. was produced. And since it is the *conspiring* which the law regards as criminal, the offence is complete and consummate by conspiring, though no act should be founded upon it (*f*); and, therefore, in strictness, it is unnecessary to allege any overt act done in pursuance of the criminal design (*g*). But since the conspiracy itself, (to use the words of Mr. J. Grose,) (*h*) is a matter of inference deduced from criminal acts, done in pursuance of an apparent criminal purpose in common between the defendants, and therefore the indictment for a conspiracy bears a resemblance to an indictment for treason, it is, at all events, proper to allege one or more overt acts done in prosecution of the confederacy on which the indictment is founded.

In an indictment for conspiring to charge a man with any offence, it is not necessary to allege, that the defendants conspired *falsely* to indict the party, for his innocence will be presumed till the contrary appear (*i*); and for the same reason, the indictment need not allege that the party is innocent (*k*).

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| (<i>d</i>) <i>R v. Rispal</i> , Burr. 1320. | Kel. 203. 254. 27 Ass. pl. 44. |
| 1 Salk. 174. Holt, 151. | 16 Ass. pl. 62. <i>R. v. Gill and another</i> , 2 B. & A. 404. |
| (<i>e</i>) Per Perryn, Baron, in delivering judgment in Fuller's case, Leach, 924. Burr. 999. | (<i>h</i>) <i>R. v. Brisac and Scott</i> , 4 East, 171. |
| (<i>f</i>) Salk. 174. | (<i>i</i>) 1 Salk. 174. 2 Burr. 993. |
| (<i>g</i>) Salk. 174. 1 Vent. 304. | (<i>k</i>) 1 Salk. 174. |
| 1 Sid. 174. 1 Lev. 125. 62. | |

But unless the object of the conspiracy be criminal, it seems to be necessary to shew an intention to accomplish it by some improper means.

Thus, it is necessary, in an indictment against overseers and others, for conspiring to marry paupers, in order to rid the parish of the burthen of maintaining them, to shew that it was brought about by illegal means, by violence, threats, or some other sinister means, promises, or bribe, without the voluntary consent or inclination of the parties themselves (l). For since the act of marriage is in itself lawful, a conspiracy to procure it can only amount to a crime, by the practice of undue means; and this is said to have been frequently ruled by the judges (m). But where the indictment stated, that the marriage was procured by threats and menaces, it was holden to be sufficient, without averring it in terms to have been against the will or consent of the parties, though that should be proved upon the trial (n). But in these cases, the question which has been chiefly considered, is, whether the marriage would effectuate that intention usually charged upon the defendants, viz. to exonerate their own parish, and to throw the burthen upon another.

In the case of the *King v. Edwards* (o) and others, judgment was arrested upon an indictment for conspiring together, and giving the husband money to marry a pauper, who was an inhabitant of B. in order to defeat her settlement in that parish, because it was not averred, that she was last legally settled in B. And it has been holden necessary in such an indictment to allege, that the

(l) Per Buller, J. *R. v. Fowler and others*, East, P. C. 461.

(m) *R. v. Parkhouse, &c.* cited, East, P. C. 462.

(n) *R. v. Parkhouse, &c.* cited, East, P. C. 462.

(o) 8 Mod. 320.

husband was a poor person, and unable to maintain himself and his wife (p).

In Tremayne's Pleas of the Crown (q) is a precedent of an indictment against Allibone and others, for conspiring to persuade one Hilliard to marry a woman much in debt, by *representing her to be a woman of great property*, and afterwards to induce the said Hilliard to execute bonds to a stranger.

Also a similar indictment (r), for conspiring to marry a rich infant, of the age of 13 years, to the daughter of one of the defendants, and to effect their purpose by *representing to the young man that the daughter was very rich, and by threatening to transport the daughter, unless she complied*. And another precedent of the same kind (s), for a conspiracy to bring about a marriage between a rich heir and a woman of bad character, by *representing her as of good character and large property*. And, therefore, unless the object of the conspiracy be manifestly criminal, it seems that the means should be shewn to be unlawful.

In an indictment for conspiracy to prevent the course of justice by producing a false certificate, under the hands of justices of the peace, that a road is in repair, it is not necessary to allege, that the defendants knew that the contents were false, it is sufficient to allege that the defendants agreed to certify the fact as true, without knowing that it was so (t).

In a conviction under the stat. 39 & 40 G. 3. c. 106. against illegal agreements by journeymen manufacturers, the court held it to be essential that the agreement should be stated; because it is necessary to shew a criminal object, as well as a criminal intent (u).

(p) *R. v. Tanner*, 1 Esp. 304.

(q) p. 97.

(r) Trem. P. C. 98.

(s) Trem. P. C. 99.

(t) *R. Mowbray and others*,

6 T. R. 619.

(u) *R. v. Neild and others*,

6 East, 417.

But, by the express provision of the statute 37 G. 3. c. 123. against the administration, &c. of unlawful oaths and engagements, it is unnecessary to set forth the words of such oath or engagement in the indictment; but it is sufficient to set out the purport, or some material part of it (x).

Of a nature similar to the offence of conspiracy is that of unlawful maintenance, which may be described by the general term *manutenuit*, without descending to the particular means employed.

In Tremayne's Pleas of the Crown, there is an indictment for maintenance, which in the marginal note is stated to have been drawn by Saunders, which avers generally, that the defendant for one whole year unlawfully maintained a certain plea pending in the Court of Exchequer, &c. (y); though in some precedents it is also averred, that the defendant, in and for the maintenance of the said suit, expended divers sums of money (z).

The offence of high treason consisting in the internal thought and secret purpose of the mind, cannot be known, tried, or judged of, unless it be disclosed and manifested by some open act, which must be set forth in the indictment (a). Where the treason consists in the compassing the king's death, or in adhering to his enemies, the particular acts of compassing and adherence must be set forth, and where the treason consists in levying war against the king, it must be alleged according to the fact, that the defendants assembled with a multitude, armed and arrayed in a warlike manner, with the proper allegations of time and place (b). For levying of war being an overt act in

(x) *R. v. Moses*, 6 East, 419.

(a) *Vaughan's case*, 8 Co. 1.

(y) Trem. P. C. 177. *R. v.*

East. P. C. 116.

Price. See also Sav. 41. Co. Ent. 163.

(b) 1 Hale, 150. East, P. C. 116. See the indictment against

(z) *R. v. Langrish*, Trem. P. C. 176.

Damaree and Purchase, Post, 213. 8 St. Tr. 219. 267.

itself, no other overt act need be alleged (c). Bare words cannot constitute an overt act of treason, although they may be evidence to explain that which is an overt act (d). But writings may, if published, amount to an overt act of treason, if written in immediate furtherance of the treasonable design (e). In such cases it has been held, that it is not necessary to set forth the tenor of the treasonable writings, it is sufficient to allege their substance and purport (f), for they are the evidence only of the secret intention and compassing of the mind (g). And where other overt acts are alleged, it is not necessary that the whole detail of evidence should be set forth. It is sufficient that the charge be stated with reasonable certainty, so that the prisoner may be apprised of the nature of it (h).

(c) 1 Haw. c. 17. s. 29. 661. Lord Preston's case, 2 St. Vaughan's case, 5 St. Tr. 21. Tr. 411. Staley's case, 2 St. Kel. 70. Benstrad's case, Cro. Tr. 655. Freeman's case, 6 St. Car. 583. Tr. 73. Roger's case, 6 St. Tr.

(d) 4 Bl. Com. 80. 123. 330. Watson's case, 2 Starkie's Fost, 200. 202. 204. 207. 346. Rep. 116.

3 Inst. 14. 140. 6 East. P. C. (g) See the precedents in 117. 1 Haw. c. 17. s. 33. 37. Hensey's case, 1 Burr. 642. De la Motte's case, East, P. C. 124. 39. 1 Salk. 631. Kel. 13. Gregg's case, 10 St. Tr. App. 77. T. Ray. 408. Lord Preston's case, 4 St. Tr.

(e) *R. v. Dr. Hensey*, 1 Burr. 644. Roger's case, 6 St. Tr. 411. Watson's case, 2 Starkie's 279. Gregg's case. 10 St. Tr. Rep. 116.

App. 77. Twyn's case, Kel. (h) Fost. 194. 220. 1 Hale, 22. 122. East, P. C. 121. Rock-

(f) Coleman's case, 2 St. Tr. wood's case, &c. St. Tr. 696.

CHAP. VIII.

Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal.

- I. *Situation or character of the Defendant*, p. 161.
- II. *Situation of others*, p. 167.
- III. *Other Circumstances collateral to the principal Act, negative Averments, &c.* p. 171.

SINCE it is of the very essence of an indictment to specify the nature of the crime charged upon the defendant, it may be laid down as a general rule, that the criminal nature of the act must appear upon the face of the indictment, and that if the act or omission be not in itself illegal, it must be shewn to be so from the particular circumstances of the case, which cannot be supplied by any intendment whatsoever (*a*).

Thus, an indictment charging a man with a nuisance in respect of a fact which is lawful in itself, as the erecting of an inn, and which only becomes unlawful from collateral circumstances only, is insufficient, unless it set forth some circumstances which make it unlawful (*b*).

The criminality of an act, in itself innocent, may arise either from the *situation* or *knowledge* of the defendant himself, or from that of *others*, or from *other particu-*

(*a*) 2 Haw. c. 25. s. 57.

(*b*) 2 Roll. Rep. 345. Pal.
368. 374.

lar circumstances contained in the definition of the offence.

I. From the situation or character of the defendant.

Where the offence consists in the omission of some duty which the law throws upon the defendant, the indictment must always shew the defendant's liability to perform such duty, unless it appear by a necessary implication of law; and in some instances must specify the circumstances which created the duty, with great precision.

Thus, in an indictment against a parish for the non-repair of an highway, or against a county for not repairing a bridge, it is sufficient to allege that the road is out of repair, or the bridge in decay; because the parish and county are severally bound, by the law, to the performance of such duties; and therefore an express averment of their obligation is unnecessary. But if a private person be indicted for not repairing a road, it must be shewn that he was under a legal obligation to repair it by reason of his tenure or otherwise (c). So where the inhabitants of a particular division of a parish are indicted for the non-repair of a road, since the obligation must arise from custom or prescription, and does not exist at common law, the indictment must shew the custom, prescription, or reason by which they are bound (d).

An indictment set forth that the defendant being qualified to be constable, was *debito modo electus* to serve that office, at Islington, and that he had notice of it, but did not take the oath to execute that office. It was objected that the indictment did not set forth that the defendant had been chosen by one having sufficient authority, and

(c) 1 Vent. 331. 1 Str. 187. *Broughton*, 3 Keb. 301. 3 Bac.

(d) 5 Burr. 2700. *R. v. Abr.* 58. 2 T. R. 111. 513;

that it did not appear how he was chosen, and whether he had had notice, and for this exception the indictment was quashed (*e*).

So an indictment for not receiving an apprentice is bad, unless it appear, on the record, that there was a binding within the 23d of Elizabeth, for otherwise it would not appear that the defendant acted illegally in refusing to take the apprentice (*f*).

So an indictment for a contempt in not executing a warrant, ought to set forth the nature and tenor of the warrant (*g*).

In an indictment for the murder of a British subject in Portugal, it was held to be unnecessary to allege either the prisoner or the deceased was a British subject (*h*).

How averred.

Where it is necessary to aver the situation or character of the defendant at the time of the act or omission, it seems to be settled that it is sufficient to aver that he *being such* did the act (*i*).

An information under the statute (*k*) which enacts, that if any person, &c. above the age of 14, shall unlawfully take a maid or woman unmarried, &c. charged, that the defendant, *being* above the age of 14 years, did take a young maid away, &c.; it was moved, in arrest of judgment, that the information did not aver that the defendant was above the age of 14 years at the time of taking, but only that he *being* above the age of 14 years, did take.

(*e*) 5 Mod. 96. Comb. 328. the Exchequer Chamber. East-
See *R. v. Burder*, 4 T. R. 778. er Term, 55 G. 3.

1 Cowp. 683. (i) 2 Haw. c. 25. a. 112

(*f*) Str. 1268. *R. v. Trevi-* Cro. J. 610. 2 Mod. 128. 2
an. Roll. Rep. 286. Moor, 606.

g 1 Vert. 305. 2 Lev. 229. Ray. 378. Keb.
Before all the Judges in 852.

(*k*) 4 & 5 P. & M. c. 8.

But the court held that the information was good, and distinguished between the case where the *existens* is added to the person acting, and where it is applied to the subject of the act; that if an indictment for a forcible entry should aver that the defendant on such a day, with force and arms, did enter into such a house, being the freehold of J. N. without saying, *then* being the freehold, the indictment would be bad; but that in the principal case the *existens* being added to the person, carried the sense to the time of the offence committed (*l*).

So if a man be indicted for not coming to church, it is sufficient to say that *existens* of the age of 16 years, he did not come to church (*m*).

And it seems to be a general rule, that where the criminality of the act or omission arises from the particular situation of the party, which operates as a disqualification, it is unnecessary to aver that disqualification with circumstances of time and place (*n*).

So in an indictment against a defendant for misconduct in a particular office or situation, it is sufficient to allege, generally, that he was in such an office or situation at the time. In the case of the *King v. Holland* (*o*), the indictment stated that he was a counsellor in the room and place of R. M. during the period in which certain malversations in office were alleged to have been committed by him; but the court held that the allegation was sufficient, and observed, that in criminal prosecutions, and actions against justices of the peace and clergymen, for any offences committed by them in their respective situations,

(*l*) *R. v. Moor*, 2 Mod. 128. Buller, J. *Berryman v. Wise*, 2 Roll. 126. 4 T. R. 366. *R. v. Hube, Peake*,

(*m*) 2 Mod. 130. 131. Gordon's case, Leach,

(*n*) 2 Haw. c. 25. s. 84. 112. 581. 3 T. R. 632.

(*o*) 5 T. R. 623. and per

constant practice had settled that, as against them, the exercise of their office is proof of their obligation.

Where a statute visits a second offence with an increased punishment, it is necessary to shew a previous conviction for the first offence, by setting out the record (*p*). And it should be shewn that the second offence was committed subsequently to the first conviction (*q*).

From the criminal knowledge of the defendant.

Where a particular knowledge on the part of the defendant renders what he did criminal, the fact of his knowledge must be expressly averred (*r*). And this important averment is the principal one in a very large class of offences, comprehending all accessories after the fact, all utterers of forged notes and counterfeit money, &c. for in such case the very essence of the crime consists in the guilty knowledge of the defendant.

Staunforde, speaking of indictments against those guilty as accessories in receiving felons, after laying it down as a general rule, that the indictment must state the *manner of the felony*, and the *knowledge* of the party receiving the felon, excepts the case where the felon has been attainted in the same county, for then he says it is not necessary to make mention of the manner of the felony (*s*), for it is sufficient that he was attainted, though the attainder be erroneous; in which case it was not lawful for any one to receive him, for every one is bound to take notice of this attainder, which is matter of record in the same county. But this doctrine seems to have been materially contradicted (*t*).

Lord Hale says, "I never thought that opinion of

(*p*) East's P.C. 919. 1 Hale, 686. 1 Haw. c. 70. s. 25. 3 Tr. 172.

(*q*) East, P. C. 919.

(*r*) 2 Haw. c. 25. s. 66, 67.

(*s*) Staun. 96. 8 E. 4. f. 3.

(*t*) 3 P. Wms. 494.

Staundforde to be law, that the receipt of a felon after attainer in the same county; made a person accessory without notice, because he is bound at his peril to take notice that he was attainted; for it oftentimes lies as little in the knowledge of many persons who are convict of felony or treason, as whether a man be guilty of it (*u*)."

And Lambard (*x*), in commenting on this doctrine, observes, "Bracton very reasonably requires a right and direct knowledge in the parties, to make them accessory in the one case as well as in the other, for albeit a record, and especially the pronounciation of an outlawry, be so notorious, that every man may easily come to know the same; yet were it an over great extremity that each man should, at the peril of his own life, inform himself and take understanding of it."

And Lord Hardwicke, in the case of the *King v. Berridge* (*y*), observes, the reasoning of Lambard appears to be very judicious, and upon the whole of this point we all think that the true way of understanding these books is, that an outlawry or attainer in a particular county may, as the case may happen to be circumstanced, be some evidence of notice to an accessory in the same county; but that it cannot, with any reason or justice, create an absolute legal presumption of notice, so as to excuse the not charging the fact to be done *sciens* or *scienter*, in the indictment.

In an indictment for carrying a person, ill of the small-pox, from one parish to another, it was holden to be necessary to aver that defendant *knew* that the party so carried had the small-pox (*z*).

(*u*) 1 Hale, 323. Vide Dyer, 355.

(*x*) p. 293.

(*y*) 3 P. Wms. 496.

(*z*) Andr. 162.

And in general, wherever a statute makes a guilty knowledge part of the definition of an offence, the knowledge is a material fact which must be expressly averred (*a*). But where a statute prohibits generally, and is silent as to intention, it appears clear, that a pleader need not aver knowledge upon the face of the indictment; how far, in such case proof that the defendant's mind was free from all guilty knowledge, would go towards his exculpation, is a question which need not here be considered (*b*).

Therefore, under the stat. 23 G. 3. c. 13. against seducing artificers, it is unnecessary to allege that the defendant knew the person to be an artificer (*c*).

How the knowledge must be averred.

No express form of words is essential to this averment. It has been holden, that an indictment averring that J. S. *scienter receptavit* such a one being a felon, was insufficient, for want of an express averment that J. S. knew the person, so received by him, to have been a felon (*d*). But this, as observed by Serjeant Hawkins, is contradicted by a number of later decisions, in which it has been holden, that the word *scienter*, in such a case, shall be construed to go through the whole sentence (*e*).

Upon an indictment for attempting to seduce a soldier, under the stat. 37 Geo. 3. c. 70. (*f*) it was holden that the word *advisedly* contained a sufficient averment of knowledge; and it was holden, in the same case, that an averment of knowledge is virtually included in the averment that the defendant *endeavoured* to seduce (*g*).

(*a*) *R. v. Jukes & al.* 8 T. R. 536.

(*b*) See *R. v. Bell*, Fost. 430, and also Fost. 439.

(*c*) *R. v. Myddleton*, 6 T. R. 739.

(*d*) 7 H. 6. 42.

(*e*) 2 Haw. c. 25. s. 67. 2 Lev. 208. 8 Ed. 4. 3. Str. 73. 904.

(*f*) *R. v. Fuller*, Leach, 916.

(*g*) *Ib.*

II. *From the situation of others.*

An indictment charging a constable with having voluntarily and feloniously suffered a person arrested by him, on suspicion of felony, to escape, without shewing what the nature of the felony was, and that it was actually committed, is void, both for want of shewing that any offence had actually been committed by the person arrested, and also for not specifying what the felony was; for, unless the arrest were for a felony, the suffering the escape would not be felonious (*h*).

So in an indictment for a rescous, the indictment ought to shew, that the party rescued was in legal custody, and, as it is said, should set out the writ and warrant (*i*).

So in an indictment against an innkeeper for not receiving a sick person, it must be averred that the latter was a traveller (*k*).

A prisoner was indicted, under the stat. 10 G. 2. c. 31. for having conveyed instruments into the prison of the Poultry Counter, with intent to aid and assist the escape of Henrietta Lake, he well knowing the said Henrietta to have been lawfully committed to the said prison, *upon suspicion* of forging a promissory note of 100*l.* with intent to defraud one Elizabeth Whitelock, &c. The act on which this indictment was founded, makes the offender guilty where the prisoner “was committed to, or detained in, any gaol, for treason or felony expressed in the warrant of commitment or detainer.” The judges were unanimously of opinion, that a commitment upon suspi-

(*h*) 2 Haw. c. 25. s. 66. (*i*) *R. v. Westbury*, 8 Mod.
Cro. Eliz. 752. Str. 12. 26. 357. *R. v. Freeman*, Str
1268. 3 P. Wms. 497. 3 H. 1226.
6. f. 2, (*k*) 112 Mod. 455.

cion essentially differed from a commitment for treason or felony clearly and plainly expressed, which can never be the case where the commitment is upon *suspicion* only (*l*).

An accessory after the fact can only become so from his criminal conduct in respect of another, who has before that time committed a felony (*m*). The charge, therefore, against a criminal of this description, consists of two parts: first, of the *felonious situation* of the principal, and, secondly, of the guilty knowledge and conduct of the accessory. In the first place, it is an invariable rule, that the guilt of the principal must be averred upon the record. This may be done in different ways, according as the principal and accessory are indicted together, or as the accessory is separately indicted, after the conviction of the principal. In the first case, the indictment first charges the principal with the commission of the felony, and then avers, that the said C. D. well knowing the said A. B. to have done and committed the said felony, in manner and form aforesaid, afterwards, to wit, on, &c. at, &c. did feloniously receive, comfort, harbour, and maintain the said A. B.; or, that he did such other act, in respect of the principal felon, as makes him an accessory. Where the accessory is indicted after the conviction of the principal, and in the same county, the indictment may either allege, that the principal committed the felony, and then charge the accessory, as in the former case, or may set out the record of the conviction of the principal, averring that he was in due form of law convicted of such felony, and then

(*l*) *R. v. Walker, Leach*,
114.

(*m*) 3 *Ins.* 138. *Hale*, 218.
Bracton, c. 13. s. 1 & 2. *R. v.*
Berridge, 3 *P. Wms.* 439.

proceed to charge the accessory as in other cases (*n*); and the indictment need not allege that the principal has been attainted (*o*).

But where a person is indicted in one county, as accessory to a felony committed in another, it seems to be necessary to allege, positively, the commission of the felony in the second county: this was expressly holden (*p*) by the judges, who consulted upon the mode of proceeding against Lord Sanchar, as an accessory before the fact, and the reason which they gave, seems to be equally applicable to the case of an accessory after the fact (*q*).

In an indictment against one for a misdemeanor, in receiving stolen goods, it is unnecessary to allege the original felony with either time or place (*r*); nor is it necessary to state the name of the principal offender, for the great object of the statutes relating to this offence, was to bring the receivers to justice in cases where the principal offender cannot easily be discovered (*s*).

A defendant may be indicted for receiving stolen property, if it remain the same in substance, though its name be changed; and, therefore, a principal may be indicted for the stealing of a live sheep, and the accessory with receiving twenty pounds of mutton (*t*).

In an indictment against a receiver as accessory, it must appear the value of the property stolen and received exceeded one shilling, for in petit larceny there are no accessories.

(*n*) *Fost.* 365. 8 E. 4. 3. *Fitz. Ind.* 16. *Keil.* 194. *R. v. Ber-ridge*, 3 P. Wms. 439.

(*o*) *Ib.* and *Hyman's case*, East. P. C. 781.

(*p*) *Lord Sanchar's case*, 4 Co.

(*q*) See p. 130.

(*r*) *R. v. Stott*, East, P. C. 781.

(*s*) *R. v. Thomas*, East, P. C. 781.

(*t*) *R. v. Cowell and Green*, East. P. C. 781.

The property stated to have been received, should agree with that averred to be stolen; but, in Morris's case (u), where the indictment charged the principal with stealing two bank-notes, the property of S. S. and charged the accessory with receiving the said notes, the property and *chattels* of the said S. S. it was holden, that the word *chattels* might be rejected as surplusage.

Though, in general, the offence of high treason be of so heinous a nature, that all who participate in it are considered to be principals, yet it seems, that one who becomes a traitor, by receiving the principal traitor, is so far to be considered in the light of an accessory, that he cannot be convicted before the principal, and that he ought to be specially charged with the criminal reception of the principal traitor (x).

Mrs. Lisle was indicted for "entertaining and concealing John Hicks, a false traitor, knowing him to be such," and was convicted; but her attainder was afterwards reversed, by an act of parliament, which declared her prosecution to have been irregular and illegal, since the said Hicks had not, at the time of the trial, been attainted or convicted of any such crime (y).

Where an homicide amounts to murder, because it is committed on the body of an officer in the execution of his duty, or of any private person specially protected by the law, it seems to be sufficient, in all cases, to charge the party with murder, in the common form, without any special averment as to the situation of the officer (z) killed, for the gist of the accusation is the killing with malice aforethought, which constitutes the aggravation, and, as al-

(u) Leach, 525.

(x) Foat, 346.

(y) 4 St. Tr. 130.

(z) Mackally's case, 9 Co.

67. Cro. J. 280. Cro. Car.

183. 372. 538. 3 Inst. 52.

Hale, 45.

leged in the indictment, is an inference arising upon evidence, from the circumstances of the case. But if the office be alleged, it is sufficient to aver, generally, that the person was a constable, without setting forth any circumstances relating to his appointment (a).

III. *From other circumstances.*

It has already been observed, that no indictment is sufficient which alleges an act or omission in itself innocent, unless it proceed to disclose circumstances which render such act or omission illegal. But it seems, that whether the offence be of common law or statutable origin, if a *prima facie* illegality be shewn, the indictment will be sufficient, for it is in general unnecessary to *negative any excuse* or justification, the affirmative of which would be an answer to the charge; such averments would be unnecessary, since the prosecutor would be under no obligation to prove them, and therefore the allegation and proof of such circumstances as would avail by way of justification, come most properly from the defendant (b).

In the case of the *King v. Baxter* (c), the defendant was indicted under the stat. 22 G. 2. c. 58. s. 1. which enacts, that the receiver of certain stolen goods may be indicted as for a misdemeanor, although the principal felon be not before convicted of the said felony, and whether he is amenable to justice or not. It was moved, in arrest of judgment, that the indictment was defective, inasmuch as it had not stated, negatively, that the person who had stolen the goods had not been convicted. But all the judges held that the averment was unnecessary, for that it would

(a) Gordon's case, Leach, *R. v. Pollard*, 2 Lord Ray. 581. *R. v. Halland*, 5 T. R. 1370. 2, Haw. c. 25. s. 112. 607. 1 Sid. 303.

(b) *R. v. Baxter*, 5 T. R. 84. (c) 5 T. R. 85.

be stating a mere negative averment which the prosecutor would not be bound to prove; that the fact was matter of evidence to be proved by the defendant, which, when proved, would entitle him to an acquittal; that this opinion was warranted by the case of the *King v. Pollard* (d), which was an indictment on the stat. 5 Ann, c. 31. s. 5.; and the objection was, that the prosecutor had not averred that the principal could not be taken, but the averment was not necessary; and that the principle was to be found in still older authority, 1 Sid. 303. and 2 Haw. c. 25. s. 112, where it is stated, that *if there be any description in the negative, the affirmative of which would be a good excuse for the defendant, the proof of it lies on him, and need not be stated in the indictment.*

But the above rule, as cited from Hawkins, is too general, for it has been holden, by great authorities, that a negative description must be averred, where it is an essential ingredient in the offence. According to Lord Hale, where an offence is made felony, or otherwise punishable by act of parliament, though the indictment must take in the circumstances which *in the body of the act* make up the offence, yet if by proviso in the same statute, or by any subsequent statute, some cases or circumstances are omitted out of the act, the indictment need not mention them, and qualify the offence so as to exempt it out of the proviso, but the party shall have the benefit of the proviso by pleading not guilty (e).

In Palmer's case, the prisoner was indicted under the stat. 8 & 9 W. 3. c. 26. s. 6. which enacts, that "if any person or persons shall take, receive, pay, or put off, any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces, at and for a lower rate and value than the same by its denomination

(d) Ld. Ray. 1370.

(e) 2 Hale, 170.

doth or shall import, or was coined or counterfeited for, they shall be guilty of felony." The indictment charged, that the prisoner had put off ten pieces of counterfeited milled money, made and counterfeited to the likeness and similitude of the current silver coin of the realm, called shillings, for 21 pieces of the current silver coin of the realm, called shillings, being a lower value than they by their denomination did import, &c. No count, in the indictment, stated that the counterfeit money, charged to have been put off, had *not been cut in pieces*, and the court was clearly of opinion that the indictment was bad, for the words *not cut in pieces*, are a material part of the description of the offence (*f*).

In Jones's case, an information was holden to be insufficient for not averring, that certain goods, imported from Holland, were *not of the growth of Holland* (*g*).

In the case of the *King v. Bell* (*h*), which was an indictment under the stat. 8 & 9 W. 3. c. 26. for having a coining press in possession, every thing which shewed that the defendant had no authority was negatively set out, and Lord Mansfield (*i*) held that this was necessary, and a point settled by all the authorities. And Mr. Justice Dennison observed, "there is a known distinction between exceptions in a statute, by way of proviso, which need not be set forth, and *those in the purview of the act*: and the case of *R. v. Bell* is very strong to this point, upon an indictment for having coining instruments in his custody.

It had been holden indeed (*k*), by all the judges, soon

(<i>f</i>) Palmer's case, Leach,	(<i>i</i>) Burr. 148.
120. coram Sir W. Blackstone.	(<i>k</i>) East. P. C. 167. Cro.
(<i>g</i>) Hardr. 217. Vin. Ab.	Cir. Comp. 361. ed. 1. Fost.
tit. Inf. 418.	430.
(<i>h</i>) Foster, 430.	

after the passing of the stat. 8 & 9 W. 3. c. 26. that the indictment ought to negative all the exceptions contained in the enacting clause, since the want of the authority mentioned in the exceptions, is part of the description of the offence. The same point was decided in the early part of the last century, in the case of a prisoner who had been convicted before Mr. J. Turton, at York (*l*).

And in the case of *R. v. Jarvis* (*m*), Lord Mansfield observed, "it is a known distinction, that what comes by way of proviso in a statute, must be insisted on by way of defence by the party accused; but, where exceptions are in the enacting part of the law, it must in the indictment charge that the defendant is not within any of them."

In the case of convictions, it has long been fully (*n*) settled, that the information must negative the exceptions contained in the purview of the statute upon which the conviction is founded (*o*). In the case of the *Queen v. Matthews* (*p*) indeed, it was holden, that in a conviction under the stat. 4 & 6 Ann. c. 14. it was sufficient to allege, generally, that the defendant, *not being qualified according to law, &c.*; but, in the subsequent cases of *R. v. Hill* (*q*), *R. v. Pickles* (*r*), and *R. v. Jarvis* (*s*), it was holden, that the several qualifications in a conviction, under

(*l*) East. P. C. 167.

(*m*) Fost. 430. 1 East. R. 644. Burr. 148. See E. P. C. 177.

(*n*) *R. v. Ford*, Str. 555. *R. v. Bryan*, Str. 1101. Doug. 331. Sander's case. 1 Saund. 262. *R. v. Tucker*, Ld. Ray. 1386. *R. v. Little*, Burr. 613.

(*o*) And even those contained

in a clause, to which the enacting clause expressly refers. *R. v. Pratten*, 6 T. R. 559. 1 Str. 497. 1 East, 644.

(*p*) 10 Mod. 27.

(*q*) Ld. Ray. 1415.

(*r*) Cited by Lord Mansfield, Burr. 148.

(*s*) Burr. 148.

the statute of Ann, ought to be expressly negatived (*t*). In a penal action indeed, upon the same statute, it has been holden to be sufficient, to negative the qualifications generally; yet Mr. J. Foster, in the case of the *King v. Jarvis*, intimated his opinion that this was not sufficient (*u*). These, indeed, were cases of summary conviction, before justices of the peace, but there does not appear to be any distinction, in principle, between information before magistrates and convictions; for every thing essential to the true description of the offence, ought to be alleged in an indictment, and that which is not essential to such a description is unnecessary in a conviction; and the court, in the case of the *King v. Jarvis*, seem to have considered the same arguments as applicable to (*x*) indictments as well as convictions.

Hence it may be inferred, that the position cited from *Hawkins* is too general, and that it does not extend to exceptions contained either in the enacting clause, or in a clause to which it immediately refers; and it is to be remarked, that in *Baxter's* and *Pollard's* cases, there was no necessity to call in aid so general a rule, for there the offence consisted in receiving stolen goods, knowing

(*t*) In the case of *R. v. Theed*, which was the case of a conviction under the stat. 8 Ann. c. 9. s. 10. it was not alleged that the search was made in the day time, or that the officer was attended by a constable, yet the conviction was holden to be good, for the court would not presume an illegal act. 2 *Ld. Ray.* 1375. *tamen qu.*

(*u*) This has, however, been

sanctioned by many precedents, under the stat. 5 Ann. c. 5.; but, in general, in a declaration under a penal statute, it is necessary to negative the exceptions in the purview, 1 *T. R.* 444. 7 *T. R.* 27.

(*x*) See also the opinions of *Lawrence* and *Le Blanc*, justices, in the case of *R. v. Stone*, 1 *East*, 644.

them to have been stolen; and though the authority of the court to try the offenders depended upon the negative circumstance that the principal felons had not been convicted, the definition of the offence itself remained just as it was before, wholly clear from any negative description.

The instance cited by Serjeant Hawkins, in support of his very broad position, is the case of an indictment for not going to church, in which it is unnecessary to aver, that the party had no reasonable excuse, &c.; it is a full answer to this to observe, that the stat. 29 Eliz. c. 6. s. 5. has rendered such an allegation unnecessary, by prescribing a general form of indictment.

And from analogy to the decisions in cases of convictions, it seems to be necessary in an indictment, not only to negative the exceptions in the purview of the statute, but also those to which the enacting clause immediately refers (*y*); and that, if exceptions be negatived, where it is not necessary they may be rejected as surplusage (*z*).

In an indictment for not repairing a highway founded on a prescriptive liability with certain exceptions, by virtue of a statute, it must be alleged that the highway in question is not within the exceptions (*a*).

(*y*) *R. v. Pratten*, 6 T. R. 59. tutes, see tit. Indict. on Statute.

(*z*) *R. v. Hall*, 1 T. R. 322. (*a*) *R. v. Mayor of Liverpool*, 3 East, 86.
or further observations upon
indictments founded upon sta-

CHAP. IX.

Of averring the Defendant's Intention.

TO render a party criminally responsible, a vicious will must concur with a wrongful act (*a*). But though it be universally true, that a man cannot become a criminal, unless his mind be in fault; it is not so general a rule, that the guilty intention must be averred upon the face of the indictment.

In cases of treason, the traitorous inclination and design is expressed by the word *proditorié*.

And in all cases of felony the act must be alleged to have been committed *felonicé*, a word denoting the corrupt intention of the defendant to perpetrate the particular species of felony with which he is charged. But where a particular intention, either at common law, or by the enactment of a statute, is essential to the offence, that intention must be expressly and plainly averred. Thus, in an indictment for burglary it is necessary to aver, either that the defendant did break into the dwelling-house and steal certain property, or that he broke in with intent to commit a specific felony (*b*); and the technical averment that the act was committed *burglariter*, does not in the latter case supply the want of a direct allegation of the defendant's intention. And there seems in general to be a distinction between cases, where the *attainment* of a particular criminal object constitutes the

(*a*) Haw. c. 73. s. 1. 5 Co. 4 Bl. Comm. 125. *R. v. Ld.* 125, 5 Mod. 165. Salk. 418. *Abington*, 1 Esp. R. 228.

(*b*) 1 Hale, 561.

plies: but where the act is indifferent in itself, the intention with which it was done then becomes material, and requires, as does any other substantive matter of fact, specific allegation and proof.

It is frequently advisable to state specially the intention with which a particular offence was committed, though the offence itself, which is the foundation of the prosecution, be entirely independent of the particular intention charged. Thus, in an indictment for an assault, it is usual, for the purpose of aggravating the punishment, to aver, that it was made with intent to commit murder or rape, according to the fact, in order to guide the court in their infliction of punishment.

The same burglarious entry may be laid, in several counts of the indictment, to have been made with different intents; as, with intent to steal the goods of J. D. in the first count, and with intent to murder him in the second; for the facts and evidence are the same (*l*).

With what particularity.

When an evil intent, coupled with a particular act, is criminal, it does not appear to be essential to state the particular way in which the act was intended to produce the mischief: thus, as has already been noticed, it is unnecessary, in an indictment for forgery, to shew the particular method by which the defendant intended to render his fraud profitable; but it is sufficient to allege, that he forged the note, &c. with intent to defraud a particular person. But, in such cases, the intent must be proved as laid (*m*), and a variance would be fatal; therefore, in case of burglary, if the entry be alleged to have been made with intent to commit a specific felony, the indictment

(*l*) *R. v. Thompson*, Norfolk, Summ. Ass. 1781. East, P. C. 515.
 (*m*) *R. v. Powell*, Leach, 90.

will not be supported by evidence of an entry with intent to commit another kind of felony (*n*): so, if A. be indicted for a burglary, with intent to steal the goods of J. W. he cannot be convicted upon evidence that he intended to steal the goods of J. D. (*o*); for the averment is material, and cannot be rejected as surplusage. So an averment of an intent to steal goods, is not supported by proof of an intent to rescue goods from an excise officer (*p*). And though where the burglary includes a larciny, it is sufficient to lay it to have been done with intent to steal, &c. the converse of the proposition is not true; for a burglary laid with a larciny, will not be supported by proof of a burglary with intent (*q*) only, for these are different offences, and an acquittal of the latter cannot be pleaded in bar of an indictment for the former (*r*). If an act be charged to have been done with a felonious intent to commit a crime, and it appear upon the face of the indictment that the crime, though perpetrated, would not have amounted to a felony, the word felonious being repugnant to the legal import of the offence charged, may be rejected as surplusage (*s*).

(*n*) 1 Hale, 561.

(*o*) *R. v. Jenks*, East, P. C. 514. See the same case, Leach, 896. from which it appears, that the objection was taken at the trial, but over-ruled, and the prisoner was convicted.

(*p*) *R. v. Dobbs, &c.* E. P. C. 513.

(*q*) East, P. C. 514.

(*r*) *R. v. Vandercomb and Abbott*, Leach, 816.

(*s*) *R. v. Scofield*, East.

P. C. 1029. Cald. 397. But qu. whether the word can be rejected as surplusage where the defendant is charged with having feloniously committed an act which is not felony, and not merely, as in the above case, with having attempted (with a felonious intent) to do that which is not felony. See *R. v. Holmes*, Cro. Car. 376. Kel. 29. *affir.* 2 Hale, 172. *neg.*

CHAP. X.

Of the Description of Persons, Places, and Things, connected with the Offence, with Names, Quantity, and Value.

- I. *Certainty of Persons, p. 182.*
- II. *Of Places, p. 188.*
- III. *Of Things moveable, p. 192.*

ACCORDING to Lord Hale, there must be a certainty in every indictment touching the thing wherein or of which the offence is committed (*a*).

This certainty seems to consist in the special description of the persons, places, and things mentioned in the indictment, with their respective names, situation, extent, nature, quantity, number, value, and ownership.

Certainty in the names of persons and things, the situation of places, and the names and ownership of property, is in general substantial, and the allegations concerning them must be strictly proved. Magnitude, quantity, number, and value, are, in some instances, essential to the description of the offence, and should, it is said, be stated with certainty, to enable the court to judge of the heinousness of the offence, and to inflict a proportionate punishment; but it seldom happens that a variance from these allegations is material.

I. Of the description of persons with certainty of names.

In an indictment for murder, it is in general essential to state the name of the deceased, and inquests, for the want

(a) 2 Hale, 182:

of this particularity, have frequently been holden to be defective (*b*).

And though indictments have formerly been allowed, which charged the defendants with suffering divers bakers to bake, &c. against the assize, for distraining divers persons without cause, without specifying the manner of those so suffered to bake or distrained upon: yet, according to latter authorities (*c*), such indictments are insufficient, for they do not enable the court to judge of the measure of punishment which the offence calls for, neither do they apprise the defendant of the facts relied upon, so that he may be prepared for his defence; and an acquittal upon so general a charge, would not enure to his defence upon a subsequent indictment founded upon the same circumstances. So, according to Staunford, the person murdered ought to be named, in order to enable the party charged to vouch for his acquittal (*d*).

So, in burglary, the dwelling-house must be laid to be the dwelling-house of the real occupier (*e*).

So in an indictment for stealing in a dwelling-house to the amount of 40s. (*f*) the name of the person in whose house the larciny was committed must be averred (*g*).

And the rule seems to be the same in indictments for arson (*h*).

And though the averment *burglariter domum cujusdam Ricardi fregit* (*i*) has been held sufficient, the authority of this case has been much doubted, and indeed with great reason, for the two cases cited in support of it are directly

(*b*) 2 Haw. c. 25. s. 71.

(*g*) Leach, 270. 257.

(*c*) Br. Ind. 21. 2 Roll. Ab.

(*h*) Leach, 270. Qu. et vid.

80. 38 Ass. 11. 22.

Leach, 261. 11 Co. 29. 6

(*d*) Stann. 181. b. 2. c. 18.

Bac. Ab. 652.

(*e*) Leach, 104. 272.

(*i*) Moor, 466.

(*f*) 12 Ann, c. 7.

against it (*j*) and the third proves no more than that an indictment for stealing the goods *cujusdam ignoti* (*k*) is sufficient, which is no authority for the principal case, since there is a wide difference between an averment that the person is unknown, and an imperfect description of one who can be ascertained.

So, in general, the name of the owner of property stolen must be specified (*l*).

Next, with what certainty the name should be stated.

It has been holden, that an indictment for an assault upon *John*, parish priest of D. in the county of C. is sufficient, for it is such a description of the person that it can apply to one only (*m*).

Next the description by the name of baptism only, without any further description, is insufficient; for though in a note of a case in *Moor's Reports*, it is said to have been adjudged that an indictment against one Cole, *quod burglariter domum cujusdam Ricardi fregit*, was good without the surname, yet, as has already been observed, this case does not appear to have been warranted by the authorities cited in support of it.

But there is no necessity for any addition to the name of the person robbed or murdered, it is sufficient if the indictment be true, that is, that J. S. was robbed or murdered, though there be many of the same name (*n*).

It is usual to describe the person injured to be in the peace of God and of the king, but these words are not necessary (*o*).

The person may be described by the name by which he is usually known (*p*).

(*j*) 18 Ass. 15. F, Ind. 27. (*n*) 2 Hale, 182.

(*k*) 9 E. 4. 1.

(*o*) 4 Co. 41. 2 Haw. c. 25.

(*l*) 1 Hale, 512. 2 Haw. s. 73.

c. 25. s. 71. Leach, 578.

(*p*) Leach, 1006. 2 Haw.

(*m*) 2 Haw. c. 25. s. 72.

c. 25. s. 72.

Any repugnancy or inconsistency in the description of the person injured will vitiate the indictment, as where the defendant is charged with stealing the goods *prædicti* J. S. no such person having been previously mentioned (q). For though in civil actions the word *prædictus* has been rejected as surplusage(r), yet this is said to have been done by virtue of the statutes of jeofails, which, it is well known, do not extend to criminal cases.

And it may be laid down as an universal rule, that any variance from the name laid in the indictment will be fatal upon the trial.

The special exceptions to the rule, as already observed, rest upon necessity, and consist of cases where a particular description would be impracticable or highly inconvenient.

Thus it has been holden to be sufficient to aver, that the defendant murdered *quendam ignotum* (s), where a stranger, unknown to the country, is found slain, or where the dead body is so mutilated, that the remains cannot be sworn to be those of a person formerly known by name.

So it is said, that if a stranger, unknown to the country, be robbed, and will not come in to prosecute, or discover his name, an indictment against the offender for having robbed *quendam ignotum* (t) is good. So (u) an in-

(q) 2 Haw. c. 25. s. 72.

(r) 3 Lev. 436. Cro. Eliz. 709. Qu. and see tit. Amendment.

(s) 1 E. 3. 20. 1 Ass. 7. F. Coron. 159. 23 Ass. 94. F. Ind. 10. 2 Hale, 181. Plowden, 85. 129. 9 H. 6. 45. b. Dyer, 99. 285.

(t) F. Ind. 12. 17. 2 Hale, 181. Dyer, 99. Keil. 25. Plowden, 85. 129.

(u) So if a person steal the goods of an abbey during a vacancy, he may be indicted for stealing *bona ecclesiæ*. 7 E. 4. 14. F. Ind. 15.

dictment may be maintained for assaulting *quendam ignotum* (*x*), or against a highwayman, or other person notoriously suspected, who has been apprehended with a number of valuables in his possession concerning which he can give no satisfactory account (*y*).

And in such case it has been laid down, that the defendant may be charged with stealing the property of persons unknown, or with stealing them generally (*z*). But the latter branch of this position seems very dubious; for the indictment in that case would neither allege whose the property was according to the general rule, nor account for the omission, by saying that the proprietors were unknown.

For it seems perfectly clear, that the omission of the name of the party murdered or robbed is warranted by necessity only; and that, whenever the name can be ascertained, it ought to be specified (*a*). Therefore, in an appeal of death, the name must always be alleged; for since such a proceeding must be instituted by the nearest relation, the name must of necessity be known (*b*). And it was anciently holden, that whenever one was indicted for the death of another, the inquest ought to tell his name (*c*),—a position certainly much too general for the purposes of justice, since it would ensure the escape of a murderer, whenever the name of the party could not be ascertained.

But, as already observed, it has long been perfectly

(*x*) Plow. 85 b. Dyer, 99.
285. 2 Hale, 181.

(*y*) 2 Haw. c. 25. s. 71.

(*z*) 2 Haw. c. 25. s. 71. F.
Ind. G. 26. S. P. C. 95. cont.
F. Ind. 27. Bl. Ind. 20. 30
Ass. 37.

(*a*) 2 Haw. c. 2. s. 71. Dyer,
285. Summ. 107.

(*b*) 2 Haw. c. 23. s. 78. Ib.
c. 25. s. 71.

(*c*) 1 E. 3. 20. 26. 1 Ass. 7.
Fitz. Cor. 159. 183. B. Ind.
10.

settled, that an indictment for the murder or robbery of a person unknown is intrinsically sufficient, whether exception be taken by demurrer, or upon motion in arrest of judgment (*d*). And the same reason extends to the case of a receiver of stolen goods, who may be indicted without naming the principal offender (*e*).

The proper limitation to this class of exceptions must, therefore, be applied by the court in its discretion upon the trial; for if it then appear, that the name was in fact known to the jurors, it must also appear that the statement was not warranted by the exigency of the case, and the petit jury cannot consistently find the defendant guilty of robbing a person unknown, when it plainly appears that he was known (*f*).

And the opinion (*g*) of Serjt. Hawkins seems well warranted, that the want of such necessity (*h*) was probably the reason, why indictments, not shewing to whom the wrong was done, were disallowed in the old books.

It may be observed here, that a description of this kind does not deprive the defendant of his plea of *autrefois acquit* or *autrefois convict*; for if he be again indicted for the same supposed offence, he may plead his former acquittal, and aver the person to be the same (*i*).

(*d*) Summ. 107. Dyer, 285. 99.

(*e*) Vide supra, *R. v. Thomas*, p. 158.

(*f*) It was so ruled in *R. v. Walker*, by Le Blanc, J. 3 Camp. 264. the indictment was for receiving goods stolen by a person, to the person unknown, and the principal felon was called as a witness. See Sum. 95. Plow. 85. Keil. 25. 9 H. 6. 45. Dy. 99. Dalt. c. 131.

(*g*) 2 Haw. c. 25. s. 71. 30 Ass. 37. 18 Ass. 15. 2 Leon. 39.

(*h*) Note, Ld. Dyer held, that an indictment, *quod felonice cepit bona cujusdam ignoti*, was sufficient; because the goods may be carried into another county, and so not known who had the property. Dyer, 99.

(*i*) Plowden, 85 b. Dyer, 97. 285. 2 Hale, 181.

And as the name of the principal individual, to whom the injury has been done, may in cases of necessity be omitted, so, for the same reason, may the names of others by means of whom the offence has been committed.

The defendant (*k*) was indicted for selling divers quantities of beer to divers faithful subjects, to the jurors unknown, in unlawful measures. Upon demurrer the defendant objected, that the indictment did not state to whom the beer was sold; but the court held, that the indictment was sufficient, for the informer might not know the name of the person to whom it was sold; and that it was an offence, let it be sold to whom it would (*l*).

In the case of the regicides it was holden, that the fact of beheading the king was well laid to have been done by some person unknown, with a vizor on his face (*m*).

In an indictment for harbouring thieves, it has been holden to be unnecessary to specify their names.

So an indictment stating, that the defendant *cum viginti septem aliis* (*n*), engrossed, &c. has been holden to be sufficient.

II. Next as to the description of the place, &c. connected with the offence.

In indictments for burglary it must be averred, that the defendant broke and entered the *dwellinghouse of another*; and it is not sufficient to charge him with breaking and entering the house simply (*o*).

The house must be laid to be the dwelling-house of

(*k*) *R. v. Gibbs*, Str. 497. Str. 186. contra.

(*l*) Note, judgment was given for the defendant on another exception. In *R. v. Roberts*, 4 Mod. 100. 3 Salk. 198. the

same objection was taken, but the court does not appear to have decided upon it.

(*m*) Kel. 10.

(*n*) Cro. Car. 380.

(*o*) 1 Hale, 550.

the real occupier (*p*), and a variance in evidence would be fatal (*q*). And the same rule applies to indictments for arson (*r*). And in an indictment for stealing in a dwelling-house to the amount of 40s. in order to oust the defendant of his clergy, his surname as well as the christian name of the person, in whose dwelling-house the offence was committed, should be averred (*s*). Also in an indictment under the stat. 3 W. & M. c. 9. for stealing property from lodgings, the name of the person, by whom the goods and lodgings were let, must be specified (*t*).

If several inhabit several rooms of a house, part of which house is also occupied by the owner, the house must be averred to be the dwelling-house of the owner, though the offence be committed in the several tenement of another occupier; but if the owner does not occupy any part each separate tenement may be laid to be the dwelling-house of the tenant (*u*).

In an indictment for burglary, laid with an *intent to steal*, a variance in evidence from the ownership laid in the indictment, will be fatal.

Jenks was indicted for burglariously breaking and entering the dwelling-house of Joseph Davis, with intent

(*p*) Leach, 104. 272. In case, E. P. C. 1034. & Haw. Cole's case, Moor, 466. the shop c. 36. s. 8. White's case, Leach, was stated to be the shop of 286. Woodward's case. ib. Richard, without any surname; M'Cabes' case, May Sess. O. B. yet the indictment seems to 1785. have been deemed sufficient. (*s*) Leach, 286. Thomson and Qu. et vide Leach, 286. Macdamil's case. Leach, 379.

(*q*) *R. v. White*, Leach, 286. (*t*) *R. v. Pope*, Leach, 377. *R. v. Woodward*, ib. 617.

(*r*) *R. v. Breeme*, Leach, 261. *R. v. Spalding*, Leach, 258. 11 Co. 29. *R. v. Holmes*, Cro. Car. 376. Rickman's (*u*) *R. v. Rogers*, Leach, 104. 272. Carrol's case. *Lee v. Gansel*, Cowp. Rep. 2. East, P. C. 499.

to steal the goods of *Joseph Wakelin*. It clearly appeared, that *Wakelin* had been inserted in the indictment, by mistake, instead of *Davis*; and the judges were of opinion, that this mistake was fatal as to the burglary; and that the prisoner was entitled to an acquittal, since the description of ownership was sensible and material, and could not be rejected as surplusage (x).

In *Durore's* case the defendant was indicted for maliciously shooting at *H. Sandon*, in the dwelling-house of *James Brewer, &c.* it appeared in evidence to be the house of *John Brewer, &c.*; and the court held the variance to be fatal, though the allegation might not have been necessary to the validity of the indictment (y).

But where a robbery laid to have been committed in the dwelling-house of *A.* is proved to have been committed in a dwelling-house, but no evidence is given of the proprietor's name, the defect is immaterial, since a robbery is ousted of clergy wherever it is committed (z).

In an indictment or presentment (a) for the non-repair

(x) *East*, P. C. 514. *Leach*, 896. S. C. but apparently misreported.

(y) *R. v. Durore*, *Leach*, 390, tamen qu. and see the next note.

(z) In *Pye's* case, *Warwick*, 1790, cor. *Thompson*, B. the robbery was laid to have been committed in the dwelling-house of *Aaron Wilday*, but no evidence of ownership was given. In *Johnston's* case, coram *Ashurst*, J. a robbery was alledged to have been committed

in the dwelling-house of *Joseph Johnstone*; the house was proved to belong to *Johnstone*, the husband of the prisoner, but his Christian name was not proved to be *Joseph*. And in both of these cases the judges held, that the prisoners had been properly convicted.

(a) *Latch*, 163. *Halsey's* case, *Pal.* 389. 2 *Roll. Rep.* 412. 1 *Str.* 44. 10 *Mod.* 382. *Andr.* 145. *R. v. Thompson*, 10 *W. 3.* 1 *Haw. c.* 76, s. 86.

of a high-way, the *termini* of the highway need not be stated, for highways have no bounds.

But it must appear, that the road lies within the parish or other division charged with the non-repair.

An indictment, charging that A. stopped a way at D. leading from D. to S. is bad, for *from D.* is exclusive of D. (b).

So the word *unto* is exclusive: in the *King v. Gamlingay* the indictment stated, that "there was and is a common and ancient king's highway, leading *from* the parish of Hatley towards and *unto* the parish of Gamlingay; and that a part of the said highway, situate, lying, and being *in* the said parish of Gamlingay, containing in length, &c. was and yet is in great decay, &c.

After conviction a rule was obtained for arresting the judgment; and the court were of opinion, that the indictment was defective, for the defendants were only bound to repair that part of the road which lies within their own parish; but the road is described as leading from Hatley *unto* Gamlingay, which excludes Gamlingay, and therefore judgment was arrested (c).

So in the case of *Hammond v. Brewer* the question was, whether the stat. 26 G. 2. c. 54. for repairing the road *to* and *from* the town of Battel in Sussex, excluded or included the town of Battel; and it was holden, that both the words *to* and *from* were exclusive (d).

A conviction under the stat. 5 G. 3. c. 14. for fishing without the leave of the owner, alleged the offence to have been committed "in part of a certain stream which runneth between B. in the parish of A. in the county of W. and C. in the same county;" and it was quashed, because it did not shew that the intermediate course of the

(b) 2 Roll. Ab. 81.

(c) Leach, 596.

(d) 1 Burrow, 376. Leach,

597.

stream between the two *termini* was in the county of W. (e).

It has been holden necessary to state the extent of the evil complained of by a description of the length and breadth of the road out of repair (f).

But probably the omission of the quantity would not now be considered as a fatal objection; since the court does not now estimate the fine from the description of the length and breadth of the road, as stated in the indictment. And it has been holden, that an indictment, averring that a certain highway and bridge were in a ruinous condition, was good, though it did not state the extent of the nuisance.

It is sufficient to describe the road as a common king's highway generally, without stating whether it was a foot-way only, or a way for horses, carts, and carriages; for if it be a common highway. it is an highway for all these purposes (g).

III. *Next as to the description of moveables.*

It is not allowable to aver generally, that the defendant stole the goods and chattels of J. S. without specifying them (h).

And, according to Lord Hale, the same certainty is required in an indictment for goods as in trespass for goods, and rather more certainty; for what will be a defect of certainty in a count will be much more defective in an indictment; and the learned judge adds, therefore, for this matter vide title Count, *et breve per totum* (i).

(e) *R. v. Edwards*, 1 East, 2 Saund. 158. Trem. 201. 205. R. 278. Cro. Car. 266. 1 Salk. 359.

(f) 1 Haw. c. 26. s. 88. Cas. temp. Hard. 106. 316. (h) 2 Haw. c. 25. s. 74. 496.

(i) Hale, 183.

(g) Cases temp. Hard. 315.

Chattels should, it appears, be described with certainty of their *nature, quantity, or number, value, and ownership* (k).

In the description of the thing itself, certainty to a common intent, as it is technically called, is generally sufficient; which seems to mean such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen, is the very same with that upon which the indictment is founded; and shew judicially to the court, that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel.

Where the subject matter is defined by a statute, the descriptive words contained in the act should be also used in the indictment. Where the act uses several descriptive terms, one of which being general includes the more specific term, an indictment would be bad, which used the more general instead of the more special description.

Thus, it was holden, that an indictment under the stat. 14 G. 2. c. 6. and 15 G. 2. c. 34. for stealing a *cow*, was not supported by proof that the defendant stole a *heifer*; the judges being of opinion, that as the statutes, upon which the indictment was founded, mentioned both *heifer* and *cow*, in describing the several animals they were intended to protect, the one must have been used in contradistinction to the other, and therefore that the evidence did not support the indictment (l).

<p>(k) <i>R. v. Burnaby</i>, <i>Ld. Ray</i>. 900. <i>Playter's case</i>, 5 Co. 34. <i>R. v. Catherall</i>, <i>Str.</i> 900.</p>	<p>a warrant for the payment of money, although the stat. 7 G. 3. c. 50. s. 1. mentions both;</p>
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<p>(l) <i>Cooke's case</i>, <i>Leach</i>, 123. But it has been held that a bill of exchange may be described as</p>	<p>see <i>E. P. C.</i> 994. and <i>supra</i> tit. <i>Forgery</i> and <i>infra</i>. tit. <i>Variance</i>. Seals set in gold come</p>
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A certain dog, *called* a greyhound, has, it is said, been deemed to be a sufficient description of a greyhound (m).

In an indictment (n) for stealing an animal, generally considered by the law to be *feræ naturæ*, it must be averred, either that it was dead or reclaimed at the time of the felony; and therefore an indictment for stealing a *pheasant* of the goods and chattels of H. S. was holden to be insufficient; for without an averment to the contrary, it must be presumed to continue in its original state. And the mere statement that they are of the goods and chattels, is not in itself sufficient (o).

In an indictment under the stat. 22 & 23 C. 2. c. 25. against stealing fish out of ponds, &c. the fish may be alleged to be the *prosecutor's* property, though the allegation is not necessary (p); neither is this necessary under the stat. 5 G. 3. c. 14 (q). But unless the fish be taken from a trunk or stew, or other situation in which they are kept deprived of their natural liberty, it would be improper to describe them to be of the *goods and chattels* of the prosecutor (r), but if they be stolen from a trunk net, stew (s), or close pond (t), they are the subject matter of larciny, and may be described to be of the goods and chattels of the owner. But the indictment should de-

within the description of jewels under the stat. 10 G. 3. c. 48. *R. v. Moses*, E. P. C. 754.

(m) In a conviction under the stat. 5 Ann. c. 14. *Boscawen on Convictions*, p. 97.

(n) *Staunf.* 25 b. 3 Ins. 109, 110. *Rough's case*, East's P. C. 607.

(o) *Ib.*

(p) *R. v. Steer and others*, 3 Salk. 189. 6 Mod. 183.

(q) *R. v. Hunsdon*, East. P. C. 611.

(r) But the description may be rejected as surplusage, E. P. C. 612.

(s) *R. v. Steer*, 3 Salk. 189. 6 Mod. 183.

(t) *Lamb.* 274. *Staun.* 25. 3 Ins. 109. 1 Haw. c. 33. s. 39.

scribe what kind of pond it was, in order to shew that the taking amounted to felony.

By the stat. 2 G. 2. c. 25. (u) "if any person shall steal or take by robbery any Exchequer orders or tallies, or other orders, entitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes (x), South Sea bonds, East India bonds, dividend warrants of the Bank, South Sea company, East India company, or any other company, society, or corporation, bills of exchange, navy bills, or debentures, goldsmiths' notes for the payment of money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars are termed in law a chose in action, shall be deemed guilty of felony, of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen or taken, by robbery, any other goods of like value, with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby and remaining unsatisfied; and such offender shall suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value with the monies due on such orders, &c. respectively, or secured thereby and remaining unsatisfied."

In an indictment under this act, the instrument stolen, &c. must be expressly averred to be a *bank note* or a *bill of exchange*, or some other of the securities specified; and, therefore, it is insufficient to charge the defendant

(u) Made perpetual by 9 G. 2. c. 18. the plural, the statute extends to the stealing of a single bank

(x) Though the word is in note. Hassel's case. Leach, 1.

with stealing a certain note *commonly called a bank note*, for none such is described in the act (y). And in the case of a *bank note*, it is sufficient to describe it generally as a bank note of the governor and company of the Bank of England for the payment of one pound, &c. the property of the prosecutor, the said sum of one pound thereby secured then being due and unsatisfied to the proprietor.

And notes, bills, &c. within the act, should be laid to be the property of A. B. and ought not to be described as *chattels*; but in the case of *Sadi v. Morris* (z), where they were laid to be the *property and chattels* of J. S. the word *chattels* was rejected as surplusage.

Of the description of quantity, number, and value.

It is in general necessary to ascertain the *quantity* by an averment of magnitude, weight, or number.

In the case of the *King v. Gibbs* (a), where the indictment charged the defendant with having sold divers quantities of beer in unlawful measures, it was objected, that the court could not, on account of the generality of the charge, form a judgment in what degree to punish the offender; and the court held, that for this fault the indictment must be quashed (b).

An information (c) charged Martin Van Henbeck with selling to such a one so many pipes of wine, not containing, as they ought to have done, 126 gallons each, and alleged, that though they were so defective, the defendant had not defalked the price *according to the want of measure*, whereby he had forfeited (d) to the queen the value

(y) Craven's case, Lanc. Summer Ass. 1801. coram Ld. Alvanley, East, P. C. 601.

(z) East, P. C. 601. As to the legal description of the note, &c. see the precedents.

(a) Str. 497.

(b) See also 2 Roll. Ab. 81. pl. 14, 15, 16, 17. 8 Mod. 58. Andr. 75. Str. 900. Playter's case, 5 Co. 54.

(c) Leon. 38.

(d) Under the stat. 18 H. 6. c. 17.

of the wine so defective; and judgment was given for the defendant, because it was not shewed in how many vessels there was a deficiency.

A certain quantity, to wit, fifteen bushels of, &c. has been held to be sufficiently certain (e).

So it is insufficient to charge the defendant with selling loaves short of weight, without shewing how much they wanted in weight (f).

So indictments have been holden to be insufficient, which charged the defendant with stealing *magnam quantitatem straminis*, and *diversos cumulos tritici*,—*duas centenas casei*, without adding any substantive to *centenas*, in order to ascertain the weight (g).

So the number of the several individual things stolen must be expressed, for though the court, in the case of the *King v. Wetwang*, refused to quash an indictment which charged the defendant generally with stealing *quosdam pisces* (h), yet this was by the opinion of two judges only, and against that of Mr. J. Twisden; and it was not directly adjudged by the two, that the indictment was good, but merely that the defendant ought to plead to it (i). On the contrary, an indictment was holden to be bad, which averred, that the defendant, feloniously took *twenty ewes and lambs*, because it did not appear how many of the one, and how many of the other he took, but it was said that *twenty sheep* alone would have been sufficient (k).

So an indictment for erecting several cottages, *contra*

(e) *R. v. Arnold*, 5 T. R. 353.

(h) 2 Keb. 178. 1 Lev. 203. Andr. 162.

(f) Salk. 687.

(i) See 2 Haw. c. 25. s. 74.

(g) Cro. Eliz. 754. 2 Haw. c. 25. s. 74.

(k) 2 Hale, 183.

formam statuti, without shewing how many, was holden to be bad for uncertainty (*l*).

So was an indictment charging that the defendant, "*felonice furatus est oves et columbas*," without expressing the number (*m*). But in an indictment for counterfeiting the king's coin, it is necessary to specify the kind of coin, though not the number (*n*).

So an indictment is insufficient charging the defendant with having engrossed a great quantity of fish, geese, ducks, &c. (*o*).

Next as to sums and value.

. It is a general rule, that if theft be alleged of any thing, the indictment must set down the value, that it may appear whether the offence is grand or petit larciny (*p*).

It is sufficient to allege the subject matter to be of such a value, or of such a price. By some of the earlier writers (*q*) on criminal law, it has been holden to be proper to shew the worth of all living things, and of such dead things as are sold by weight and measure, by averring, that they were of such a price, and the worth of other dead things by expressing their value (*r*), yet this distinction does not seem to be warranted (*s*), and, according to Lord Hale, this is but clerkship, and they may be used indifferently, (*t*).

In grand larciny it is essential that the value of the chattels stolen should exceed one shilling, and it must

(*l*) 2 Roll. Ab. 85.

(*m*) 2 Hale, 182.

(*n*) Long's case, 2 Hale, 187.

(*o*) *R. v. Gilbert*, 1 East, 582. 1 Str. 497. 2 Haw. c. 25. s. 74. 1 Sid. 317. cont. 6 Mod. 42.

(*p*) Lamb. 497. 2 Hale, 183.

(*q*) Lamb. b. 4. c. 5. f. 497.

2 Hale, 187.

(*r*) Lamb. b. 4. c. 5. f. 497.

(*s*) 2 Haw. c. 25. s. 75.

(*t*) 2 Hale, 183. Cro. Jac. 130.

therefore appear to be of greater value (*u*). And as it is essential to every species of larciny, that the property be of some value (*x*), it seems to be equally necessary that the value should appear to the court upon record.

It is questioned by Serjeant Hawkins (*y*), whether the value of the goods be essential to an indictment for trespass or any other crime where the value is immaterial to the nature of the offence, since in many ancient writs of trespass the value of the goods is not expressed; there seems, however, to be this material distinction between writs in civil proceedings and indictments:—in the former case, the damages are to be assessed by a jury; and, therefore, it is not so requisite to set out the precise value upon the face of the record; but in criminal cases, the punishment is frequently inflicted at the discretion of the court, which ought therefore to be judicially informed of the circumstances and magnitude of the offence.

Where money, which is the current coin of the realm, has been stolen, it *seems* to be sufficient to allege the stealing of so many guineas or shillings of the current coin of the realm, in monies numbered, without averring their value (*z*); for to allege that 40 shillings of the current coin of the realm were of the value of 40 shillings, would be superfluous, and to aver them to be of greater or less value would be repugnant (*a*). Where several articles

(*u*) 2 Hale, 183.

(*x*) See Mrs. Phipoe's case, Leach, 774. and Com. Dig. Ind. G. 2. This seems to be necessary even in those cases where a statute makes it capital to steal a specific chattel, as a cow, &c.

(*y*) 2 Haw. c. 25. s. 75. See Dalton, c. 181. Lamb, b. 4. c. 5. f. 496, 7. 2 Hale, 183.

(*z*) 1 Hale, 534.

(*a*) In Leach's edition of Hawkins, vol. 1, p. 156. it is said to have been held, that an indictment charging the steal-

of property are alleged to have been stolen, the value of each should be alleged, and it is not sufficient to allege the aggregate value of the whole (b).

In general, if the property be correctly described in species, a variance from that description upon the trial, as to weight, magnitude, number, or value, will be immaterial, unless the variance either affect the nature of the crime as well as the degree of the offence, or the magnitude of the penalty. And there is a distinction between cases where to constitute the offence the *value must be of a certain amount*, but where the excess beyond that amount is immaterial, and those where the offence, or its defined measure of punishment, depends upon the *quantity of that excess*; for in the first class, if that amount be proved, which is sufficient to constitute the offence charged, a variance from the amount averred is immaterial; but in the second the amount or quantity must be proved precisely as it is laid, and any variance will be fatal. Thus, in an indictment for a highway robbery, a variance from the value laid is *wholly* immaterial, for there the value of the property affects neither the nature of the offence nor the measure of punishment.

In an indictment, under the stat. 12 Ann, for stealing in a dwelling-house to the amount of 40s. the property must be proved to be of the value of 40s. but the *excess* is immaterial (c).

ing one canvas bag containing seven guineas of the current coin of the realm of the goods and chattels of A. B. but not stating any value, was bad. See Sarah Hole's case, Cor. Gould, J, Chelmsford, 1787. but it seems that the money was laid as *goods and chattels*.

(b) 2 Hale, 183; and according to Lord Hale, such a fault, would not be aided by verdict. But qu. whether it would not be sufficient, at all events, if the prisoners were found guilty of stealing the whole.

(c) *R. v. Gilham*, 6 T. R, 265.

So under an indictment framed upon the statute 17 G. 3. c. 26. s. 7. for taking more than 10s. in the hundred pounds for brokerage, it is necessary to prove that the defendant took more than 10s. in the hundred pounds, for in that the offence consists, but the *quantum of the excess* is immaterial, and need not be proved as laid in the indictment (*d*).

But in the case of usury, where the judgment *depends upon the quantum taken*, the usurious contract must be averred according to the fact; and a variance from it, in evidence, would be fatal, because the penalty is apportioned to the value (*e*).

Ownership.

The name of the owner cannot be dispensed with except in particular instances, which are exceptions from the necessity of the case.

The indictment must either state the name of the owner of the goods, or account for the omission, by averring that the proprietor was *unknown* (*f*). And, therefore, an indictment charging that the defendant found a dead man, and feloniously stole two coats, without adding the property of some person unknown, is bad (*g*).

If the defendant steal a winding sheet or coffin from the grave, it should be described to be the property of the executors, administrators, or ordinary, as the case may be (*h*).

And since an executor is entitled to possession before

(*d*) So in the case of extortion, *R. v. Burdett*, 1 Ld. Ray. 149. and *R. v. Baynes*, Ld. Ray. 1265.

(*e*) *R. v. Gilham*, 6 T. R. 265.

(*f*) Vid. *supra*. description of persons.

(*g*) 2 Hale, 181.

(*h*) 2 Hale, 181. 12 Co. 112.

Haines's case.

he has proved the will, he may prosecute before probate (i).

And it is unnecessary to allege a special title, either in the executor or in ordinary, in case of an intestate, because their titles are founded upon possession.

But if the personal representatives cannot be well ascertained, the coffin, &c. may be described as the property of some person unknown (k).

If one steal the goods of a church during a vacancy, he may be indicted for stealing *bona ecclesiæ* (l). But this seems to be justified by necessity only (m).

If the goods of a parish be stolen, they ought to be described as the goods of the parishioners of S. being in the custody of the churchwardens, and ought not to be described as *bona ecclesiæ* generally (n). But they may be described as the goods and chattels of the churchwardens described by their proper names (o).

In an indictment for stealing lead affixed to a church, the property ought not to be laid either in the churchwardens or in the parishioners (p); but in the case of the *King v. Hickman and Dyer* (q), it was holden, that the property in such case might be laid to be the vicar's. But Buller J. was of opinion, that it was absurd, in such case, to lay the property in any one; property in this respect being applicable to things personal only, and that it should

(i) Hale, 514.

(k) East, P. C. 653.

(l) 7 E. 4. 14. F. Ind. 15.
S. P. C. 95.

(m) 2 Haw. c. 25. s. 71.

(n) 2 Hale, 181. Cro. Eliz.
145, 179. Vide postea, as to
the provisions of the statute
lately made as to stealing pro-

perty belonging to a parish—
Precedents—Larciny.

(o) Per Bayley, J. *R. v.*
Artley, York Summer Ass.
1814.

(p) *R. v. Parker and Easy*,
East, P. C. 592.

(q) *R. v. Hickman and*
Dyer, 1 Leach, 358. East, P. C.
593.

only be charged to be lead affixed to the church, or to the house belonging to such a person (r).

If the goods of a chapel be stolen, they must be described as *bona et catalla capellæ in custodia præpositorum*, or if it be done in vacation, *bona et catalla capellæ tempore vacationis* (s).

And it is sufficient, in general, if the goods be laid to be the property of one who has but a special property in them, as if A. deliver goods to B. a common carrier to carry for him, and B. is robbed, the indictment may allege them to be the goods of A. or the goods of B, at election, for B. has a special property in them because he is chargeable for them to A. (t).

So goods stolen from a stage coach may be described to be the property (u) of the coachman; those stolen from an inn, the property of the landlord (x); those stolen from a bailee as the property of that bailee (y) and it is not even necessary that the bailee should be responsible to the principal owner for the loss of the goods; for it has been holden, that cattle may be laid to be the property of the agister, on account of his possession, though he is not answerable to the owner for the loss (z). So where a master feloniously steals his own property from his ser-

(r) 1b.

(s) 2 Hale, 181.

(t) 1 Hale, 513.

(u) *R. v. Deakin and Smith*, coram. Grose, Ap. 1800. East, P. C. 635. Taylor's case, Leach, 395.

(x) Summ. 67. East. P. C. 653. Moor, 543.

(y) Packer's case, East, P. C. 653. Where the glasses of a gentleman's coach were stolen

from the coach whilst it stood in the coachmaker's yard; it was held that the glass might be laid to be the property of the coachmaker. *R. v. Taylor*, 1 Leach, 3d ed. 395. The goods of an uncertificated bankrupt may be laid to be the goods of the bankrupt. *Webb v. Fox*, 7 T. R. 391.

(z) Woodward's case, East, P. C. 653. Moor, 543.

INDICTMENT.

In order to charge the hundred, the goods may be said as the servant's (a). Though where property is taken from a servant in the presence of the master, the master may be alleged to have been committed upon the goods of the master.

Where property belongs to trustees who are appointed by parliament, but *not incorporated*, their private names must be specified (b), and their description in the indictment should be subjoined, to shew the capacity in which they are authorised by the legislature to act (c); but a corporation must prosecute in their corporate name; and it is not sufficient, after the enumeration of their natural names, to add they the said, &c. then being such a corporation (d); though it would be otherwise if the property was taken from particular persons by their private names, for, though they are a corporate name, their natural and individual names become extinct (e).

If A. steal the goods of A. and C. steal the same from C. A. may be indicted for stealing the goods of A. for the offence remains unaltered.

If a woman be robbed, and marry before an indictment is found, the ownership should be described by her name (f).

If the cloathes of a child, it is said, may either be alleged to be stolen from the child or to the father, but the latter seems the correct course (g).

Hale, 513.

Haw. c. 34, 35. *R. v.*

Palmer, E. P. C. 991.

105. 3rd edit.

Leach, 578, *R. v. Sher-*

and Bulkeley.

(d) *R. v. Patrick and Pepper*, Leach.

(e) *R. v. Patrick and Pepper*, Leach.

(f) Leach, 606. 3rd edit.

(g) 12 Rep. 113. 1 Sid. 129. East. P. C. 654.

A. and B. his son, being farmers, jointly purchased a stock of sheep; B. died, leaving children, A. continued to manage the farm,—the stock was stolen, and in the indictment was laid to be the property of *A. and his grand-children*; A. swore that he considered himself as agent for the grand-children in respect of one moiety. The judges held, that though in such case there was no *jus accrescendi*, yet, that since A. swore that he held one moiety for the grand-children, no person could controvert it, and he might make distribution amongst them; and some of the judges held, that the property might have been laid in the grand-father alone, as agent to the grand-children (*h*).

It is provided by the stat. 26 G. 2. c. 19. that a person stealing part of a wreck, may be indicted and convicted, though the owner cannot be ascertained. It seems, however, upon the authority of the above cases, that an indictment at common law, stating such goods to be the property of some person, to the jurors, unknown, would have been sufficient.

It is sufficient to state the owner by the reputed name, though it be not the real name.

Thus, where the indictment charged the prisoner with having stolen the property of Victory Baroness Turkeim, the prosecutrix stated that her name was *Selina Victoire*, that Baroness Turkeim was her real title, and that she was generally known by the appellation of Ba-

(*h*) John Scott's case, coram Chambre, Northd. ass. 1801. East. P. C. 654. Qu. whether it would not have been more correct to have laid the property in the grand-father, who had the legal custody of the

whole flock; though, in point of law, the property in one undivided moiety had vested in the son's representative. See Litt. s. 321. *Fox v. Hanbury*, Cowp. 445. 2 Bl. Comm. 399. Co. Litt. 182.

roness Turkeim, and the judges held the indictment to be sufficient (i).

In Mary Graham's case (k), the property was alleged to be of the goods and chattels of James Hamilton, esq. commonly called Earl of Clanbrassil, in the kingdom of Ireland. The owner was the Earl of Clanbrassil; and the judges were of opinion, that the description was sufficient, since the dignitaries of other nations are in England merely *esquires*, and that the words commonly called, &c. might be rejected as surplusage; but that the more correct description would have been James Hamilton, esq. Earl of Clanbrassil, in the kingdom of Ireland.

It is usual to aver the property to be of *the goods and chattels* of a particular person; and in Long's case (l), the indictment alleging that the defendant *felonice cepit quandam peciam panni cujusdam J. S.* was quashed, for not saying *de bonis et catallis cujusdam J. S.*

A nice distinction is made by the earlier writers, as to the allegation of property, between things animate and inanimate; an animated being, they say, ought to be described, as the ox, sheep, or horse of the person injured, simply; but the words *bona et catalla* ought to be used where the thing taken is inanimate (m). A distinction of this kind is truly what Lord Hale calls "*but clerkship.*"

There are several precedents (n) which allege a living animal to be *de bonis et catallis J. S.*; and in Rastal's entries there is an appeal of sheep-stealing, which lays the property in the same way (o).

In general, an inaccuracy, or repugnancy in the allegation, or variance in the proof of ownership, will vitiate

(i) Sull's case, Leach, 1005.

(k) Leach, 619.

(l) Cro. Eliz. 490.

(m) Lamb. b. 4. c. 5. 496.

Dalt. c. 131.

(n) Crompt. 247. 248.

(o) Rast. Ent. 55.

the indictment: thus, as before observed, if it be alleged that the defendant stole the goods *prædicti* J. S. no such person having been previously named, the indictment will be vicious (*p*). So if a burglary be laid with intent to steal the goods of *J. Wakelin*, the indictment will not be supported by proof of a burglary, &c. with intent to steal the goods of *J. Davis* (*q*).

If the person, alleged to be the owner, be a feme covert, or appear to have no interest in the possession of the goods, the defendant will be acquitted (*r*); but he may be presently indicted *de novo*, for stealing the goods of the husband or other owner (*s*).

And, with respect to ownership, it may be observed generally, that the name of the owner of the property, in relation to which the offence is committed, should be truly stated. Thus, in an indictment for cutting tress, &c. under the stat. 6 G. 3. c. 36. it is necessary to specify the owner's name (*t*). And, as has already been seen, the same particularity is necessary in indictments for burglary, stealing in a dwelling-house, arson, and in all larcinies.

(*p*) 2 Haw. c. 25. s. 92. tam.

(*r*) 1 Hale, 513.

qu.

(*s*) *R. v. Emes*, 1 Hale, 513.

(*q*) *Jenks's case*, East. P. C.

(*t*) *R. v. Patrick and Pep-*

514. Leach, 896. See p. 177. *per*, Leach, 287.

CHAP. XI.

Conclusion of the Indictment.

AFTER describing the substance of the offence, it is necessary in cases of homicide, and usual in those of perjury, for the jurors to draw the legal conclusion from the premises, and to aver it formally upon the indictment. In case of murder, the conclusion is generally drawn in these words, "and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B. him, the said C. D. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder," &c. In many of the older precedents it is specially alleged, that the defendant murdered the deceased, at a specified time and place; but the general form is sufficient, and is preferable, for if the day or place were to be mistaken, it seems the defect would be fatal; as, if the stroke be laid at A. and the death at B. and the indictment allege the murder to have been committed at A. (a).

When the indictment is founded upon some act or omission, which is punishable as a nuisance to the public in general, it is usually averred to have been done or omitted, *ad commune nocumentum* of the king's subjects; but these words are not essential, for they neither describe the crime itself, nor the facts which constitute it; and if the facts charged, must, from their very nature, have been a nuisance to society, it is unnecessary to aver that which the court cannot but infer.

And, therefore, though indictments against common scolds, and common barretors, usually conclude *ad com-*

(a) Heydon's case, 4 Co. 44.

inane nocumentum, the conclusion has been deemed unnecessary (*b*).

At common law, the indictment in general concludes with the words, “*against the peace* of our said lord the king, his crown, and dignity.” And, wherever the offence includes a breach of the peace, the indictment should conclude, *contra pacem*, for the necessity of these words is not taken away by the stat. 37 H. 8. c. 8. (*c*); but, where the offence consists in a bare omission, as the not performing the order of a justice of the peace (*d*), or rests in tendency, or partakes of the nature of a civil proceeding, as in case of an information for an intrusion, the averment appears to be unnecessary (*e*). But if these words be alleged in an indictment for a bare non-feasance, they may be rejected as surplusage (*f*).

According to Lord Hale, “every offence against a statute, should be laid *contra pacem*,” (*g*) and though there are precedents without this conclusion, they do not appear to be warranted by any resolution (*h*), except where the offence consists in a bare non-performance (*i*).

Where the averment is necessary, it must be alleged to have been committed, “*contra pacem domini regis*,” and *contra pacem* alone is insufficient (*k*).

In different reigns.

The offence is *confined wholly* to a preceding reign, or having been committed in a *preceding reign* is *continued* into the present, or having been *begun* in a preceding

(*b*) 2 Haw. c. 25. s. 59. But see Str. 1246. contra.

(*c*) 2 Hale, 188.

(*d*) Vent. 108. 111.

(*e*) 2 Haw. c. 25. s. 92. Rast. 409. 1 Keb. 360. 364 to 372. 390. Rast. 412. Salk. 380.

(*f*) Salk. 380.

(*g*) 2 Hale, 188. 2 Haw. c. 25. s. 92.

(*h*) 2 Haw. c. 25. s. 92.

(*i*) 1 Vent. 108. 111.

(*k*) 2 Hale, 188.

reign, is consummated in the present, or is confined wholly to the present.

Where the offence is confined wholly to a preceding reign, it must be laid against the peace of the late king (l), but if it conclude also against the peace of the present king, the latter branch of the conclusion may be rejected as surplusage (m).

If a man be indicted for erecting a weir in one reign, and continuing it in a second, and conclude that it was erected and continued against the peace of the then king, without adding against the peace of the late king, it will be defective, for the gist of the indictment is the erecting, which wrong was done in the reign of the former king (n), and the offence should be laid against the peace of both.

But, thirdly, if in that case the erection had been made mere inducement, and the continuance of the nuisance had formed the gist of the indictment, the conclusion, *contra pacem regis nunc*, would have been good (o).

If an indictment be found against a man for an offence, laid *contra pacem domini regis nunc*, he may be arraigned upon that indictment after the demise of the king; for the indictment is not discontinued by the demise of the king, though in some instances process is (p).

With respect to the averment, that the offence was committed *in contemptum regis*, the only authority for it appears to be a solitary dictum in the year book, 4 H. 6. pl. 7. which seems to admit that the averment is necessary in an indictment on a statute.

The averment *contra coronam et dignitatem* is used in

(l) 3 Burr. 1901.

(o) Ib.

(m) Cro. J. 377. 2 Hale, 189.

(p) 7 Co. Rep. 30, 31. 2

(n) Sir J. Winter's case, Yel. 66. 2 Hale, 189.

Hale, 189. Vin. Ab. tit. Ind. H. 10. pl. 5. Dalt. c. 184.

many precedents (*q*), but there does not appear to be any decision in which they have been deemed essential to an indictment, and in Holbrook's case it was adjudged that an indictment for a riot was good without them (*r*).

Although every count of an indictment professes to contain a description of a distinct offence, and therefore it is proper to add to each a separate conclusion; yet since, in many precedents, each of which comprises a number of offences, there is no more than a general conclusion, such a conclusion appears to be sufficient (*s*).

In a conviction for deer-stealing, several offences were laid to have been committed on different days, and it was holden, that the general averment *illicite occidit* applied to all.

(*q*) Most of the precedents of indictments in Coke's Ent. and Tremaine's Ent. conclude so.

(*s*) *R. v. Speed*, Ld. Ray. 583. and see *R. v. Broughton*, Trem. 111. Ib. 227. 248. 45.

(*r*) 2 Roll. Ab. 82. 2 Hale, 188.

CHAP. XII.

Indictments founded upon Statutes.

- I. *Recital of the Statute and Effect of a Variance, p. 200.*
- II. *Description of the Offence:—1st. in Reference to the Circumstances mentioned in the Purview, p. 206; and 2dly. in Reference to the Language of the Statute, p. 211.*
- III. *Conclusion against the Form of the Statute, p. 215.*

IN describing the averments essential to indictments, according to the division which was proposed, no distinction has been made between those which are framed upon the common law definition of an offence, and those founded upon the purview of a prohibitory statute. Neither, with propriety, can any distinction be made as to the degree of particularity and precision essential to the description of the two classes of offences; for a statute, in general, merely defines the offence, without prescribing the technical language in which a charge of that offence is to be expressed on the face of the indictment; and in principle, the same degree of certainty is requisite in the description of both statutable and common law offences, for, though the definitions are of different origin, whatever particularity is useful and necessary in the one case, must be equally so in the other.

Many instances have already been cited which prove that a description, closely following the words of the sta-

tute, is not in itself sufficiently minute and specific. As where the indictment is founded on the stat. 33 H. 8. against obtaining money by means of false tokens, or upon the stat. 30 G. 2. c. 24. against obtaining money or goods by false pretences.

In these and numerous other instances, it has been holden to be necessary to specify the false tokens, the false pretences, and other means by which the offence has been committed, upon the face of the record (a).

It may, therefore, be assumed that there is no difference between common law and statutable offences, as far as regards the general rules, according to which the expanded description of the offence should be expressed upon the record, except, indeed, in those instances (and the exception confirms the observation) where the legislature has peremptorily directed that some general form of words shall be used.

In convictions indeed, Lord Holt held it to be sufficient to pursue the words of the statutes on which they are founded (b); but the contrary has frequently been decided since (c).

But though the same general rules apply to the description of both statutory and common law offences, there are some observations and technical rules peculiar to the former, which it will be proper to consider.

Where the statute *is of a public nature*, the court is bound (d) to take notice of it; and, therefore, such a statute ought never to be specially pleaded, since, by plead-

(a) See chap. 7.

(b) *Ld. Ray.* 583.

(c) See *R. v. Pemberton*,
Burr. 679. 1037. 2 *Haw. c.* 25.
s. 111. *Mallinson's case*, 2
Burr. 679. *Boscawen on Con-*

victions. *Chapman's case*, *ib.*
42. 2 *East*, 340.

(d) *Dyer*, 155. 346. 5 *H.* 7.
17. 6 *Mod.* 140. *Cro. Eliz.*
187. 236.

ing it, the danger of a material and fatal variance (e) is incurred.

But a private statute, if indicted upon, must be pleaded, and a mis-recital, if shewn to the court in a proper manner, will be fatal (f); and, therefore, it becomes necessary to consider with what degree of accuracy it is necessary to set forth *a private statute*. This kind of certainty relates to the *time and place* of making the statute, its *title*, or to the *purview* of the statute on which the indictment is founded.

In the first place, it has been adjudged that the total omission of the day on which the parliament was holden, is no fault in the recital of a statute (g); and, therefore, it is better to omit the day, for the purpose of avoiding a mis-recital, which would be fatal.

Thus, if a parliament was first holden on the 28th day of April, in the 32d year of Henry the eighth, and afterwards holden on the 12th day of April in the next year, and a statute, then made, be recited as made at a parliament holden on the 28th of April, in the 32d year, the variance would be fatal (h).

So if parliament be summoned for the 23d, and afterwards be prorogued to the 25th, it would be a mis-recital to describe it as of the 23d (i).

So, in some cases, an averment that a parliament was

(e) Bac. Ab. Ind. H. 2	(h) Plow. 79. 83. 84. Cro.
Haw. c. 25. s. 100. Plow. 79.	Car. 136. 232. 3 Keb. 468.
83. 84. Cro. Eliz. 236. 245.	2 Jones, 50. Hob. 310. Cro.
4 Co. 48. 1 Roll. 50. Cro.	J. 139. Cro. Eliz. 245. 2 Buls.
Car. 135. 2 Hale, 172. 1	53. 1 T. R. 224. 2 T. R. 654.
Jones, 194.	Cowp. 674.

(f) 4 Co. 3. Sid. 356.

(i) Bac. Ab. tit. Ind. H. 2.

(g) 2 Haw. c. 25. s. 104. Dy. 203.

2 Haw. c. 25. s. 104.

holden in a year when it sat by prorogation, has been considered to be fatal (*k*).

But in other cases mistakes of the latter description have been holden to be cured by the constant course of precedents (*l*).

A repugnancy in setting forth the time when the parliament was holden, is fatal, as if a statute be recited as made on such a day, in the 1st and 2d years of the king (*m*).

And, lastly, a misdescription of the time when the statute began to operate, has often been holden fatal, as if the indictment should recite, that the statute commenced at the time of making, when in fact its operation was to commence upon a day certain, afterwards (*n*).

But by the stat. 3 G. 33. c. 13. it is enacted, that the day, month, and year of passing a statute, and of its receiving the royal assent, are to be indorsed upon it, and to be deemed the date of its commencement, unless the contrary be expressed.

It has been said that an indictment was, in one instance, discharged for not averring the county in which the parliament was holden, but no reason is given for the opinion; and as it is not essential to allege the time of holding the parliament (*o*), probably an omission of the place would not be deemed material.

But a mis-recital of the place will vitiate the indictment (*p*).

With respect to the *title* and *preamble* of an act, neither

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| (<i>k</i>) Cro. Jac. 111. 139. | (<i>m</i>) 2 Haw. c. 25. s. 104. |
| Lutw. 140. 4 Ins. 27. 1 | Moore, 302. |
| Brown, 100. Yel. 127. Dyer, | (<i>n</i>) 2 Haw. c. 25. s. 106. |
| 95. 171. Skinner. 110. 111. | (<i>o</i>) 2 Haw. c. 25. s. 104. |
| (<i>l</i>) Yel. 127. 2 Keb. 34. Dyer, 203. | |
| Dyer, 171. | (<i>p</i>) Ib. Cro. Eliz. 853. |

need be set forth, for neither of them is part of the law: the title is the mere name or description given by the makers, and the preamble is no part of the statute itself, though it generally contains the motives or inducements for enacting the statute (*q*).

But Lord Holt was of opinion, that if a party undertook to set out the title, he was bound by it; so that if he pleaded the statute in justification, and could not produce one so entitled, his plea failed; that as to the saying of Lord Hale (*r*), it was said hastily, if at all, and that, notwithstanding his veneration for him, he could not agree with him (*s*).

In Parker's case (*t*) it was holden, by three judges against the opinion of Hobart, that the substitution of the word *indicari* for *indictari*, in the recital of the preamble of the statute of hue and cry, in a writ grounded upon it, was fatal; but, in an action on that statute, though the declaration, in reciting the preamble, substituted the words, "*burning of houses*," for the word "*arson*," the plaintiff had judgment (*u*).

Next, as to the recital of the purview.

It appears clear, that if any material part be omitted or mis-recited, the indictment will be bad, because it will judicially appear to the court that the foundation is vicious upon which the charge professes to be grounded (*x*).

And, therefore, if *vi* (*y*) be substituted for *forti manu*, in

(*q*) Holt. 662.

(*r*) Hard. 324. Holt. 662.

(*s*) Salk. 609. 6 Mod. 62.

Hard. 324. Hutt. 56. *Mills v.*

Wilkins, 6 Mod. 62. 3 Salk.

331. Holt, 662. *Chance v.*

Adams, contra, Hil. 7. W. 3.

Roll. 868.

(*t*) Hutt. 26. 3 Keb. 648.

662.

(*u*) See 3 Keb. 647. 661.

662. 2 Jones, 51.

(*x*) 1 Ld. Ray. 382. *Boyce*

v. Whitaker. Doug. 97. 2 Mod.

99. Cro. Car. 522. 232. 2

Haw. c. 25. s. 101.

(*y*) Cro. Eliz. 93. 2 Buls. 258.

an indictment prohibiting entries *forti manu*; *nuncia* for *mendacia* in an indictment under the statutes of scandalum magnatum (z), the indictment will be bad (a).

But if such a mistake be made in reciting a public statute, it seems the defect will not be fatal, unless the indictment conclude against the form of the *said statute* (b); for if it conclude against the form of the statute in such case made and provided, the mis-recital will be rejected as surplusage, and the court will give judgment upon that statute which warrants it (c). But where the indictment is founded upon a private statute, such a defect will not be cured by a general conclusion (d).

It seems to be a general and established rule, that a variance which does not alter the sense of a material part of the statute, will not avoid the indictment. Thus, it has been holden that the *sea* of Rome for *see* of Rome, in the recital of an oath prescribed by a statute,—I do declare in conscience instead of I do declare in *my* conscience,—maliciously *and* contemptuously for maliciously *or* contemptuously, were not fatal variances (e).

So, under the stat. 12 R. 2. *de scandalis magnatum*, it has been holden, that the prohibitory words, “none shall devise, speak, or tell, any false news, lies, or other such false things,” &c. were material words, and that a variance

(z) 4 Co, 12. 13. Cro. Car. 135. 2 Haw. c. 25. s. 101.

(a) See also Cro. Eliz. 236. Cro. J. 362.

(b) *Boyce v. Whitaker*, Doug. 94. Fost. 372. Str. 214.

(c) 2 Haw. c. 25. s. 104. 2 Hale, 173.

(d) The court will not take notice of mis-recitals of private

acts of parliament, unless null record be pleaded, except as to the commencement, prorogation, &c. 1 Lev. 206. Doug. 97. 1 Lord Ray. 318. 1 Salk. 330.

(e) Cro. Car. 135. 136. Pal. 565. 1 Jon. 194. Burrow, 999. 2 Haw. c. 25. s. 102.

in reciting the subsequent words, "whereof discord, or any slander might arise within the said realm, was not material (f).

In the older reporters, many cases are to be found, where trifling variations from the purview of the statute have been considered to be fatal.

Such as the substitution of *assise nova disseisine* for *assise nova disseisine* (g).

Or (h) expelled and disseised for expelled or disseised, or *admitteret et forisfaceret* for *amitteret et forisfaceret*" (i).

Yet it seems questionable whether these would now be considered as authorities, since the courts have relaxed much in later times from the strictness which formerly prevailed (k).

And the rule now seems to be, that if the variance consist in the omission, introduction, or alteration of words, purely superfluous and unnecessary, it will not be material if the sense be complete independently of such variance (l), unless indeed the alteration render the whole repugnant to the intent of the statute, for there, it is said, the superfluous words cannot be rejected; as, where the words, whoever shall do the same shall incur the pain, &c. are thus recited, whoever shall do *the contrary* shall incur the pain, &c. (m).

II. Having thus considered how far it is necessary, in

(f) Cro. Car. 135. 136. Cro. Eliz. 96. 307. 3 Keb. Pal. 565. 1. Jon. 194. Burrow, 999. 2 Haw. c. 25. s. 102.

(g) 2 Haw. c. 25. s. 108.

(h) Cro. Eliz. 697. See also

(i) Cro. J. 133.

(k) 2 Haw. c. 25. s. 108.

(l) See 2 Haw. c. 25. s. 109.

(m) 2 Haw. c. 25. s. 106.

an indictment upon a statute, to set forth the authority upon which it is founded, it is next to be seen how the offence is to be described.

1st. In reference to the circumstances mentioned in the statute.

2dly. In relation to the language used by the legislature.

In the first place, all the authorities concur in asserting, that all the circumstances contained in the statutable definition of the offence must be set out on the record.

Lord Hale says, "those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion." (n)

"The indictment," says *Staundforde* (o), "must set forth the offence in such manner as it is expressed in the statute, otherwise the offender shall have his clergy."

So *Mr. Justice Foster*—"It is a general rule, that all indictments on penal statutes, especially the most penal, must pursue the statute so as to bring the party precisely within it, and this rule holds, as well with respect to statutes which take away clergy from felonies at common law, as to statutes creating new felonies" (p).

And again the same learned judge observed—"Cases might be cited without number, which turn upon this general principle, that indictments upon penal statutes must strictly pursue the statute" (q).

And, therefore, a man (r) indicted of robbery, in *quâdam viâ regiâ pedestri ducente de London ad Islington*,

(n) 2 Hale, 170. See also Hale, 517, 525, 535. Brooke's case, Hard. 20.

(o) Fo. 130. b.

(p) Fost. 423.

(q) Fost. 424.

(r) 38 H. 8. Moore, n. 16. p. 5.

(s) 23 H. 8. c. 1.

had his clergy, for the words of the (s) statute are "for robbery in or near the highway, he shall be ousted of his clergy," and therefore the indictment and conviction must be of a robbery *in vel propè altam viam regiam* (t).

So an indictment in a præmunire, for aiding one being a principal maintainer of the see of Rome against the form of the statute, the words being omitted, "to the intent to set forth the authority, &c." which were part of the qualification of the offence contained in the statute, was holden to be insufficient and not aided by the conclusion (u).

An indictment under the stat. 7 G. 2. c. 21. stated, that the defendant in and upon one *A. Gillespie*, unlawfully, maliciously, and feloniously, did make an assault; and him the said A. G. then and there unlawfully and maliciously did menace, by then and there threatening and menacing to blow the said A. G.'s brains out, with a felonious intent, the monies of the said A. G. from the person and against the will of him the said A. G. feloniously to steal, &c.

The statute enacts, that if any person shall, with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in any forcible or violent manner, demand any money, goods, or chattels, from any person or persons, with a felonious intent to rob or commit robbery, &c. then, &c.

The judges were of opinion, that the indictment was insufficient in not having stated, that the assault was made with an offensive weapon, or that any demand was made; and that, therefore, no judgment could be given on it, for that it is necessary in point of law, that an indictment on any particular act of parliament should

(s) 23 H. 8. c. 1.

(t) 1 Hale, 535.

(u) Dyer, 363. 2 Hale, 193.

strictly follow the words of the act, and that the court cannot supply from any other circumstances a sufficient description of the offence (*x*).

And the same rule applies with equal or greater force to the pleading in convictions; as where a conviction charged the defendant with killing deer in a certain place where they have been usually kept, without saying *inclosed place* (*y*); or with unlawfully killing fish, omitting to add, “*without the consent of the owner of the water*” (*z*); or with insuring a ticket in the lottery, without saying “*in the state lottery*” (*a*); or with having a gun in his house, where the words of the statute are, “*use to keep in his or her house*” (*b*).

By 3 & 4 W. & M. c. 1. if a man be indicted of stealing any goods or chattels, he shall be excluded from the benefit of clergy, if it appear upon *evidence* or *examination* before the justices, that the said goods or chattels were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person had been convicted by a jury of the said other county, he or they are excluded by virtue of this or any other act from having the benefit of his or their clergy (*c*).

It is not necessary (*d*) under this statute to make any entry upon the record, that it appears by such evidence or examination that the felony was originally commenced in a different county, and was of such a nature that the offender could not have his clergy; but it is usual to write

(*x*) *R. v. Jackson and Randall*, Leach, 303. See also 2 Hale, 189, 190.

(*y*) *Ld. Ray*. 791.

(*z*) 2 Burr. 679.

(*a*) 1 T. R. 22. *R. v. Tre-*

Lacey.

(*b*) 1 Show. 48.

(*c*) See also 25 H. 8. c. 3. and 5 & 6 Ed. 6. c. 10.

(*d*) And 114. 1 Hale, 518. 2 Haw. c. 33. s. 82. E. P. C. 776.

in the margin of the indictment, that it is for a robbery, &c. in another county (e).

But it has been holden, that the offence laid in the indictment and proved, must be one in which the offender stands in need of clergy ; for otherwise, having no need to demand clergy, he cannot be hurt by being excluded from it.

So that if he be indicted of petit larciny, he is not ousted of clergy, though the goods be proved to have been burglariously stolen by the offender in the foreign county (f).

It has already been considered, how far it is necessary to bring the defendant within any mere negative description contained in a statute (g).

With respect to provisos and exceptions, the rule is clearly laid down by Lord Hale, "Where an offence is made felony, or otherwise punishable by act of parliament, though the indictment must take in the circumstances which, *in the body of the act*, make up the offence, yet if, by proviso in the same statute, or by any subsequent statute, some cases or circumstances are excepted out of the act, the indictment need not mention them, and qualify the offence so as to exempt it out of the proviso ; but the party shall have the benefit of the proviso by pleading not guilty, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of that statute (h). And this has been adjudged even in cases where the proviso is noticed in the purview of the sta-

(e) Semble, it should be made to appear by way of counterplea.	(g) Vide supra, 159.
(f) Moor, 550. 1 Hale, 536.	(h) 2 Hale, 170. Popham, 93, 94. 1 Jones, 157. 1 Lev. 26.
2 Hale, 349.	

tute (i); in a conviction (k) it has been holden necessary to notice the provisos of the statute; yet even there if the benefit be given by a proviso subsequent to the enacting clause, it is unnecessary to notice it (l).

It has been said, that if the statute, whereon an indictment is founded, be particularly recited, the general conclusion *contra formam statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which omission would otherwise have been fatal; for that since the statute is particularly recited, and the defendant is charged with having committed the offence against the form of it, and it is impossible that he could have so done, if any circumstance expressly required by the statute had been wanting, the offence may be said to be as fully set forth in the very words of the statute, as if such words had been repeated in the allegation of the offence (m).

But this reasoning appears to be defective; for if the omission of one material circumstance could be supplied by the recital, why might not the omission of a second, and where could the line be drawn? the principle once admitted, would lead to the conclusion, that an indictment would be sufficient which barely recited the statute, and then averred that the defendant at such a time and place transgressed it.

It would also be left to the jury to say, whether the fact omitted on the record, but proved in evidence was a fact the doing of which could be an ingredient in the offence, which is a pure matter of law and ought to appear judicially to the court. And besides this, there could be

(i) Popham, 93, 94. 2 Haw.
c. 25. s. 113.

(l) 2 Str. 1101.

(m) Savil, 33. 2 Roll. 227.

(k) 2 Haw. c. 25. s. 113.
Doug. 531.

2 Haw. c. 25. s. 114. Roll. 81.
contra.

no averment of time and place annexed to the circumstance omitted. Now, if the circumstance had been averred, it must have been averred with time and place; and if the omission of time and place to the averment would have vitiated the indictment, it can scarcely be contended, that the omission of the averment altogether would improve the indictment.

Where the prohibiting statute is recent, it is usual to allege expressly, that the offence was committed after the making of the statute; but where the statute is not recent, this averment is unnecessary (*n*). Where a particular time is limited for the prosecution, it should appear, on the face of the indictment or conviction, that the prosecution was commenced within the time, but a special averment is not necessary (*o*).

Where several circumstances are mentioned disjunctively in a statute, any one of which is sufficient to oust the offender of his clergy, it is sufficient to charge the defendant *disjunctively* in the indictment. Thus, it was holden to be sufficient, in an indictment for a highway robbery, to aver in the words of the statute, that it was committed in *or* near the highway; because, as has been said, the words are only descriptive of the manner. (*p*).

2dly. *As to the terms and phrases used in the statute.*

The general rule is, that the defendant must be brought within all the material *words* of the statute; for many of these have been holden to be so peculiarly de-

(*n*) 1 Saund. 1 Burr. 366.

(*o*) 2 East, 333.

(*p*) 1 Hale, 535. It is not necessary now to allege, that the robbery was committed in or near an highway, since

clergy is ousted generally; and if the averment be made, a variance from it will not be fatal. Wardle's case, East, E. P. C. 785. Pye's case, *ib*.

scriptive of the offence, that they cannot be dispensed with (q).

And this rule applies equally to offences created by a statute and to common law offences, for which the offenders are by a statute either subjected to a new punishment or deprived of a common law benefit; in the former case, if such a material word be omitted, the offender cannot be punished at all; in the latter, he is liable to the common law penalty only.

For example, in an indictment for perjury under the stat. 5 Eliz. c. 9. the word *wilfully* is essential, and must be inserted; because the word *wilful* in the statute is a material description; but in an indictment at common law, and not on the statute, the words, falsely, maliciously, wickedly, and corruptly, imply that the offence was committed *wilfully*, so that an indictment at common law would be good without such an allegation (r).

An indictment (s) under the Black Act stated, that the defendant with a certain pistol, &c. did unlawfully, maliciously, and feloniously shoot at one A. B.

The words of the statute are, "If any person or persons shall *wilfully* and maliciously shoot, &c." The question for the judges was, whether the indictment was not defective for having omitted the word *wilfully*.

According to the report of this case, the point was much debated; some of the judges thought, that the word *wilful* was implied in the word malicious; but a great majority were clearly of opinion, that as the legis-

(q) Fost. 424. Cro. J. 607.
Stowe's case.

(r) R. v. Cox, Leach, 82.
See Hetl. 12. Cro. Eliz. 147.
201. 2 Hale, 187. Show. 190.
3 Ins. 167.

(s) R. v. Davis, Leach, 556.
See also Emmot v. Fulwood,
1 And. 49. Hinton v. Roffey,
3 Mod. 35. Foster's case, 11 Co.
58. R. v. Remnant, 5 T. R. 170.
R. v. Jukes, 8 T. R. 536.

lature had, by the special penning of the act, used both the words *wilfully* and *malicious*, they must be understood as a description of the offence; and that the omission in the indictment before them was fatal to its validity (t).

So necessary has it been deemed to pursue precisely the language of the statute, that the indictments against the regicides alledged the compassing and imagining of the king's death as the treason, in the terms of the statute, and merely alledged the actual destruction of the king as the overt act (u).

In some instances, however, the use of the identical words used by the legislature has been dispensed with, and their place holden to be supplied by expressions deemed to be equivalent. Thus it has been holden, that the words "wilful murder" might be supplied by laying the killing to be of malice aforethought. So in *Lodowick v. Grevil's* case (x) it was holden, that the words of the indictment, "excite, move, and procure," were, equivalent to the words of the statute (y), "counsel, hire, or command."

And in a proceeding founded upon a remedial statute, it has been holden to be unnecessary to follow the words of the statute so precisely as in an indictment (z).

In Mr. Justice Foster's report of the case of the *King v. M'Daniel* and others, he says, in the case cited (a), the

(t) See also 1 Show. 190.
11 Co. 58. 2 Hale, 192. 2
Haw. c. 25. s. 110. Cro. Eliz.
147. 201. And. 49. Dyer, 363.
2 Burr. 679. 5 T. R. 170.
2 Leon. 211. Hale, 517. 525.
535. 2 Hale, 336. Hard. 21.
8 T. R. 536.

(u) Kel. 8. 1 Hale, 107. 119.
167. Fost. 193. 196. 3 Ins. 12.
(x) And. 195.
(y) 4 & 5 Ph. & M. c. 4.
(z) 2 Bl. R. 842. 3 Wils.
318. 3 East. 244.
(a) 1 And. 195.

indictment was holden to be sufficient, though the words of the statute of Ph. & M. were not pursued; the words, *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute, "counsel, hire, or command(b)."

"I take this to be good law, though I confess it is the only precedent I have met with where the words of the statute have been totally dropped; and I the rather incline to this opinion, because I observe that the legislature, in statutes made from time to time concerning accessories before the fact, hath not confined itself to any certain mode of expression, but hath rather chosen to make use of a variety of words, all terminating in the same general idea."

But if the words of the statute may be abandoned in describing an accessory before the fact, and can be supplied by equivalent words, there seems to be no sufficient reason, why the doctrine of substitution should not extend to other cases.

The reasoning used by Mr. Justice Foster seems carried a great length, and to support it, two steps are necessary: first, the words of a whole class of statutes are construed to be descriptive of an accessory before the fact; and, secondly, it must be contended, that such an accessory may be described in the language of the common law, without reference to the terms of the statute. It appears, indeed, that the part of the report, from which the above extract is taken, was not delivered in court; so that the dictum which has been cited, does not bear the same stamp of authority with a position publicly and judicially advanced by so able a judge(c).

Great difficulty exists in drawing the precise line, which

(b) 4 & 5 Ph. & M. c. 4.

(c) Vide 6 East, 417.

shall ascertain at once the latitude which ought to be permitted in the description of offences for the purposes of justice, and that wholesome caution and strictness, which ought to be observed for the avoiding of confusion, and the exhibiting of the defendant's guilt with certainty upon the face of the record; in order that substantial justice may not be frittered into empty form on the one hand, and that the life and liberty of the subject may not be placed in jeopardy by ignorance or carelessness on the other. But, at all events, where an indictment is founded upon a statute, reason and convenience seem to require, that the terms and expressions used by the legislature, as descriptive of the offence, should be adopted in framing that indictment; the insertion of others does not seem justifiable on any principle; for a substituted word or phrase can never so directly and pointedly support the charge as the one used by the legislature.

III. *Of the averment that the offence was committed against the form of the statute.*

The necessity for this averment may be considered,

1st. In cases affected by one statute only.

2ndly. In those affected by more than one statute.

If an offence did not exist at common law, but is entirely created by a statute, it seems, from all the authorities, to be necessary to aver the offence to have been committed contra formam statuti (d), and that, in default of such an averment, no judgment can be given against the defendant(e). And the rule is the same where an offence at

(d) 2 Haw. c. 25. s. 117. (e) 2 Haw. c. 25. s. 116. 2
2 Hale, 192. 1 Saund. 135. Hale, 192. 251. 1 Saund. 135.
n. 3. Doug. 428. 5 Mod. n. 3. Doug. 428.
307.

common law is made an offence of an higher nature, by a statute, as where a misdemeanor is made a felony, or a felony treason (*f*).

Where the offence existed at common law, but the offender is, under particular circumstances, deprived by a statute of some benefit to which he was entitled at common law, the averment is unnecessary, for the statute does not inflict a new punishment, neither does it alter the nature of the offence (g). But the averment in such case would not be improper; for though the statute does not inflict a new penalty, it takes away an old privilege (h).

So under the statute 21 J. 1. c. 27. it was holden to be unnecessary to conclude against the form of the statute, for the act created no new crime, but only introduced a new rule of evidence (*i*).

Where the offence existed at common law, and an additional punishment is inflicted by the statute, the offender, if this averment be omitted, is liable to the common law punishment, but not to the new penalty under the statute (k).

Where the offence existed at common law as declared by a statute, such as the stat. 25 E. 3. de prodicionibus, the averment may be either used or omitted (l).

Where an offence, as described in the indictment, is pu-

(*f*) 2 Haw. c. 25. s. 116. *R. v. Clerk*, Salk. 370.

(*g*) 2 Hale, 190. 1 Saund. 135. a. n.

(*h*) 2 Hale. 190. *Page v. Harwood*, Aleyn, 43. Sty. 86. *Ld. Ray*. 150. 1 Salk. 212.

(*i*) 2 Hale, 190. 288. 2 Haw. c. 46. s. 43. Kel. 36.

(*k*) 2 Hale, 190. 1 Saund. 135. 2 Roll. Ab. 82.

(*l*) 2 Hale, 189. But under the st. 39 G. 3. c. 85. although it is declaratory, it is necessary to indict specially. See *R. v. Jones*, E. P. C. 576.

nishable at common law only, and yet the indictment avers it to have been done against the form of the statute, it seems to have been doubted whether the indictment was good at common law. Lord Hale was of opinion, that if the offender were not brought within the words of the statute, if the indictment concluded *contra formam*, it should be quashed, though an offence be described which is indictable at common law (m)

As if a man be indicted for drawing his dagger in the church, upon J. S. *against the form of the statute*, but the indictment omit the words, "with intent to strike (n)," the indictment will be quashed.

But in numerous instances the conclusion has been holden to be mere surplusage (o).

Where several statutes related to the same offence, it was formerly holden that it ought to be laid to have been committed *contra formam statutorum*, and it is seriously recommended; by great authorities, to lay the offence *contra formam statut.* which might be taken either in the singular or the plural as the case required;—this piece of precaution was rendered unavailable by the statute which prohibits the use of abbreviations in indictments. In the case of *Hothbury v. Levingham* (p), it was holden, that a conclusion *contra formam statuti* for taking *averia carucarum* was good, although the offence was prohibited by each of two statutes.

(m) 2 Hale, 171.

(n) Cro. Eliz. 231. Penhallo's case, Cro. Eliz. 307. 697. Cholmley's case, Cro. Car. 469.

(o) Say. 225. 2 Haw. c. 25. s. 115, 116. Al. 43. 2 Hale, 191. 2 Salk. 212. Cro. Eliz.

231. 5 T. R. 162. *R. v. Mathews*, Leach, 664. *R. v. Wigg*, 2 Ld. Ray. 1163. 4 T. R. 202. 1 Saund. 135. n. 3. 1 Ld. Ray. 149.

(p) 1 Sid. 348. *R. v. Collins*, Leach, 970, Ow. 135.

A distinction has been made between the case of an offence prohibited by each of two statutes, and those where an offence is punishable by virtue of two statutes taken together, and not by virtue of either singly. As where by a subsequent statute it is enacted, that the former shall be executed in a new case, or that an additional penalty shall be inflicted. But, according to later opinions, a conclusion in the singular would in the latter instances be sufficient (*q*).

If a temporary act be made perpetual by a second, a conclusion in the singular will be sufficient (*r*). So if a statute which has expired be revived by another, it seems that a conclusion in the singular is sufficient; though, according to Lord Hale, it is safer to conclude in the plural (*s*).

If one statute adopt and continue the provisions of a former, the indictment must conclude in the singular (*t*), and the former statute is continued, though the continuing statute make some alteration (*u*). So where the statute is continued in part (*x*).

Where one statute creates the offence, and another adds the penalty, the indictment ought to conclude against both (*y*). But it would be sufficient, in such case, to allege the offence to have been committed against the form of the statute, and to conclude whereby and by force of the statute, &c. (*z*).

Where the indictment is founded upon one statute

(*q*) 2 Haw. c. 25. s. 117.

(*x*) Cro. Eliz. 750.

(*r*) 2 Hale, 173. 2 Haw. c. 25. s. 117.

(*y*) 2 East, 339. Ow. 135.

Cro. Eliz. 750. 2 Hale, 173.

(*s*) Mill's case, 2 Hale, 173.

Cro. J. 142.

(*t*) Saund. 165. n. 3.

(*z*) 7 East. 517.

(*u*) Str. 1066. 1 Lut. 312.

2 Saund. 377. n. 12.

which is explained by several others, it should conclude in the singular (*a*). So where a second statute merely regulates the operation of the first (*b*).

It has been holden, that where the plural word statutes is used instead of statute in the singular, the indictment will be insufficient (*c*): as if a second statute merely continue a former one, without making any addition to it or altering the substance of its purview.

(*a*) 2 Saund. 377.

(*b*) Cro. J. 187.

(*c*) 2 Haw. c. 25. s. 117. Cro. Car. 187. Yel. 116. but see 2 Hale, 173. In Clarke's case, E. P. C. 600. the indictment, charging the prisoner with stealing money, goods, and bank notes, concluded generally against the form of the statute. An indictment under

the stat. 33 H. 8. c. 23. for a murder committed abroad, need not conclude against the form of the statute, Sawyer's case, Easter, T. 55 G. 3. An indictment lies at common law for obstructing the execution of a power given by a stat., and ought not to conclude against the form of the statute, Doug, 441,

CHAP. XII.

Caption of an Indictment.

WHERE an inferior court, in obedience to a writ of certiorari from the King's Bench, transmits the indictment to the Crown Office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the Crown Office.

The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment.

Lord Hale gives a precedent of a caption in the following form (a):

"Norfolk.—At a general sessions of the peace holden at S. in the county aforesaid, on the fifth day of October, in the twenty-fifth year of the reign, &c. before A., B., C., D., and their fellows, justices of our said lord the king, assigned to keep the peace of our said lord the king, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, by the oath of E., F., G., H., &c. good and lawful men of the said county, sworn and charged to inquire for our said lord the king, and the body of the said county it is presented, &c."

(a) 2 Hale, 165.

In the first place it must appear that the court had jurisdiction (b).

If, therefore, the caption merely set forth that it was holden before J. S. steward, ~~without~~ shewing to whom he is steward, or in what court, or that an inquest of death upon view of the body before J. S. or without adding that he was a coroner, and shewing also that he was a coroner for the district in which the inquest was taken, it will be insufficient (c). But it would be sufficient to say coroner in the county, for the court will intend that he is coroner for the whole county (d).

It has been holden sufficient to allege the indictment to have been taken at a general sessions of the peace of such a county (e), but insufficient to allege it to have been taken at a general sessions holden in such a county instead of saying for such county (f).

The caption ought to notice the authority of the justices to hear and determine divers felonies, &c. (g).

It was formerly deemed necessary to describe the justices either as the king's justices or as justices of the public peace, but it has since been holden to be sufficient to describe them as justices of the peace (h).

But it is not sufficient to describe them generally as justices of the peace, &c. without either naming them or shewing for what division they are justices; and where in their description as justices assigned to keep the peace, &c. the word assigned was omitted, the caption was

(b) *Ld. Ray.* 710. 22 *E.* 4. *Lev.* 304. 2 *Keb.* 133. *cont.* 12 *Summ.* 207. *Cro. Eliz.* 1 *Keb.* 635. *Qu.* and see 2 190. 2 *Roll.* 82. *Plow.* 76, 77. *Haw. c.* 25: s. 120. 2 *Salk.* 4: *Ca.* 41. 473. 1 *Vent.* 37.

(c) 2 *Haw. c.* 25. s. 119.

(g) *Str.* 442. 2 *Haw. c.* 25.

(d) *Ib.*

s. 121. 2 *Hale*, 166.

(e) 1 *Sid.* 247.

(h) 2 *Haw. c.* 25. s. 122.

(f) 1 *Keb.* 329. 668. 1

holden to be defective (i). But it is unnecessary to allege that the justices of the general quarter sessions were of the quorum (k).

It is a general rule, that the title of their authority should be set forth, as that they were justices of the peace, &c. justices of gaol delivery, &c. (l).

If a session be holden by virtue of several commissions, as of gaol delivery, oyer and terminer, and the peace, and the record be made up as upon all three commissions, the caption will be good, if the justices had authority to take the indictment by one of those commissions though not by the others (m).

But a caption setting forth that the indictment was taken *ad magnam curiam cum letâ tentam* is vicious, though *ad magnam curiam et ad letam* would be sufficient, for *cum letâ* does not describe any court possessing jurisdiction. So it would be sufficient to allege that it was taken at a court leet, holden with a court baron; but it would be otherwise, if both courts had jurisdiction and proceeded in different ways (n).

The caption of an indictment at a court leet, need not shew how the court was constituted, whether by grant or prescription; but this appears to be necessary where the indictment has been taken by virtue of a special commission (o).

The justices' names should be set out, and though it is not necessary to mention all, yet so many should be named as are enabled, by their commission, to take an indictment (p). But though no sessions can be held unless before one of the quorum, it is unnecessary to

(i) 1 Saund. 263. But see 2 Barnard, 383.

(k) 2 Haw. c. 25. s. 123.

(l) 2 Hale, 166.

(m) 2 Hale, 166. 9 H. 7. 9.

(n) 1 Salk. 195. 2 Haw. c. 25. s. 124.

(o) See the Caption, Fost. 3.

(p) 2 Hale, 166.

state that any were of the quorum (*q*). But this is doubted by Lord Hale, where an act expressly requires, that the offence shall be heard and determined before two justices of the peace, one of whom is of the quorum (*r*).

Description of the jurors.

The caption must further shew, that the indictment was found by twelve jurors of the county, city, or place, for which the court was holden (*s*). The precedent cited from Lord Hale, states the names of the jurors; but though it certainly is necessary that the names of the jurors should be returned in the *schedule*, yet in making up the record in the King's Bench, it has been the constant practice in the Crown Office to omit the names of the jurors in the caption (*t*). And it has been solemnly decided, that it is unnecessary to insert their names in the caption (*u*), though this was formerly doubted (*x*); but the caption must shew, that the offence was presented by *twelve* jurors (*y*). It should appear that they were *sworn* and *charged*, but the omission of the latter word will not be fatal (*z*). It has been holden necessary to allege, that they were *then and there* sworn and (*a*) charged, and for what county or division (*b*). And it must appear, that they acted under the obligation of an oath; and, therefore, the caption should not only allege, that they were *sworn* (*c*), but also that they made their

(*q*) 2 Hale, 167. See 26 Ib. 249. n. 1. 4 East, 176. G. 2. c. 27. in notes.

(*r*) 2 Hale, 167.

(*x*) 2 Haw. c. 25. s. 126.

(*s*) Ld. Ray. 434. 2 Hale, 167. 2 Keb. 160. 3 Keb. 807. 167. 1 Saund. 248. n. 1.

(*t*) 1 Saund. 216. n. 1.

(*z*) 2 Haw. c. 25. s. 126.

(*u*) Aylett's case in the House of Lords, July 6, 1786, *R. v. Atkinson*, 1 Saund. 248. n. 1.

(*a*) Ib.

(*b*) Ib.

(*c*) 1 Sid. 140. 1 Keb. 498. 2 Haw. c. 25. s. 126.

presentment upon *oath*; but it has been holden, in some instances, that the words, “ present upon their oath,” supply the place of the words “ sworn and charged” (*d*); and, probably, this would now be holden sufficient in all cases. It is unnecessary to describe them as *probi et legales homines*, for this is a necessary intendment of law.

The time when.

The caption must recite the day and year when the court was holden, and usually alleges the indictment to have been then taken in the present tense (*e*). If the indictment be taken at an adjourned sessions, it should be shewn when the original sessions began (*f*); and if an improper, uncertain, or impossible day be laid, it will vitiate the indictment (*g*). As where the sessions were alleged to have been holden *ad Festum Epiphaniæ* instead of *Epiphaniæ*, for *Epiphanius* is a saint in the Roman calendar; and, therefore, it appeared, that the sessions were holden at a time different from that appointed by the statute (*h*).

The place of taking the indictment.

It must be shewn, that the indictment was taken at some place within the county or division for which the jurors are returned; for otherwise they would have no authority to inquire (*i*). It is usual, as in the above precedent, to state in the margin of the caption, the county, city, or division, for which the jurors inquire; but this is not of necessity any part of the caption (*k*). But if the county or division be so named in the margin, it is not

(*d*) 1 Keb. 629. 2 Haw. c. 25.
s. 126.

(*e*) 4 Co. 48. Yet qu. whether this be necessary; see 1 T. R. 316. and *R. v. Hall*, 1 T. R. 320.

(*f*) Str. 865.

(*g*) 1 T. R. 316. 2 Keb. 582.

(*h*) *R. v. Warre*, Str. 698.

(*i*) See chap. 1. and 2 Hale,

166.

(*k*) 2 Hale, 166.

absolutely necessary to repeat it in the body of the caption, though it is usual and more correct to do so (*l*). If the county named in the margent be not repeated in the body of the indictment, express reference must be made to it by the words in the county aforesaid (*m*). If the caption state no place, or an uncertain one, it will be vicious (*n*): as if it set forth, that the indictment was taken at a sessions holden at B. without shewing in what county B. is (*o*). So if, by act of parliament, the quarter sessions shall be holden at a particular place, and *not elsewhere*; the caption must shew the sessions to have been holden at that place (*p*). But in Long's case (*q*), a coroner's inquest was stated to have been taken at Cossam, before W. S. the queen's coroner, within the liberty of her town of Cossam aforesaid; and this was holden to be sufficient, without expressly shewing that Cossam was within the liberty of the town of Cossam.

Conclusion of the caption.

It seems formerly to have been the custom to conclude in this form, "it is presented that A. B. &c.;" but the more correct form seems to be this, "It is presented in manner and form following, that is to say, Lancashire, to wit, the jurors for our lord the king, &c." and then to copy the whole of the indictment *verbatim*.

And where the county or division is mentioned in the margent of the indictment, and the place mentioned in the body of the indictment is referred to the county in the margent by the words in the county aforesaid, it seems to be necessary to introduce the indictment according to the

(*l*) 1 Will. Saund. 308. R.
v. Kilderley, n. 1.

(*m*) 2 Hale, 180. 3 P. Wms,
439. *supra*, p. 60.

(*n*) Cro. J. 276.

(*o*) Cro. Eliz. 137. 606. 738.

(*p*) 1 Haw. c. 25. s. 128.

(*q*) 5 Co. 120.

latter method; for otherwise the indictment would appear to be insufficient, for referring the place mentioned in it to the county *aforsaid*, no county having been previously mentioned. (r). But regularly the county mentioned in the margin is not an essential part of the record, unless it be made so by an express reference to it in the body of the caption, or of the indictment itself (s).

(r) See p. 60. and 1 Saund. 308. n. 1. (s) 2 Hale, 165, 166.

CHAP. XIV.

Defective Indictment.

- I. *Language of Indictments*, p. 242.
- II. *Indictment, uncertain, double, and indefinite Allegations*, p. 244.
- III. *Repugnancy—Doctrine of Surplusage—Use of a Videlicet*, p. 247.
- IV. *Variance*, p. 355.

“**I**N favour of life great strictness has at all times been required in point of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence; and many times, gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonour of God. And it were fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, grow mortal, without some timely remedy (a).”

Such were the observations of Lord Hale upon the niceties and refinements, which a mistaken and misplaced humanity had ingrafted upon this branch of the law.

But although this *disease* has not been cured by any general and amending statute, the courts have relaxed much from their former strictness in construing indict-

(a) 2 Hale, 193.

ments; and many exceptions, formerly holden fatal, would in later times have been disregarded (b).

The salutary maxim, "*nimia subtilitas in jure repro- batur*," has been applied to criminal as well as civil pro- ceedings, and trifling exceptions have been frequently overruled (c).

Every indictment, must, indeed, contain a complete de- scription of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; but, except in particular cases, where precise technical ex- pressions are required to be used, there is no rule that any other words shall be used than such as are in ordi- nary use, or that, in indictments or other pleadings, a different sense is to be put upon them than that which they bear in ordinary acceptation. And if, where the words may be ambiguous, it is sufficiently marked by the con- text, or other means, in what sense they are to be used, no objection can be made on the ground of repugnancy which never exists but where a sense is annexed to words, which is either absolutely inconsistent therewith, or be- ing apparently so, is not accompanied by any thing to explain or define them (d).

According to Lord Coke (e), *certainly, to a certain in- tent in general*, is required in a charge or accusation. This definition, it must be confessed, is not very intelli- gible; but, as explained by Lord C. J. De Grey (f), "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be

(b) See 2 Ld. Ray. 1169.

(c) 2 Haw. c. 25. s. 61.

(d) Per Ld. Ellenborough, C. J. in giving judgment in

the case of *R. v. Stevens and Agnew*, 5 East, 259.

(e) 1 Ins. 303. 5 Co. 121.

(f) Cowp. 682.

warranted in their conclusion of guilty or not guilty, upon the premises delivered to them ; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes."

It is essential to the *formal* validity of an indictment,

1. That it be couched in plain and intelligible language and characters.

2dly. That it contain a direct, positive, single, and definite charge.

3dly. That such charge be described without inconsistency, or repugnancy, or material variance from the facts of the case.

In the first place, the charge must be conveyed in plain and distinct language and characters.

By the stat. 4 G. 2. c. 26, all writs, process, pleadings, rules, indictments, records, and all proceedings, in any courts of justice within England, shall be in the English tongue, and shall be written in such common hand as acts of parliament are usually ingrossed in ; the words and lines to be written at least as close as the said acts usually are, and not abbreviated.

And by the stat. 6 G. 2. c. 14. all pleadings, rules, orders, indictments, and informations, &c. may be written or printed in a common hand, and with the like manner of expressing numbers by figures as have been commonly used in the said courts, and with such abbreviations as are used in the English language.

Whilst such proceedings were in Latin, the courts seem to have been very jealous of the introduction of English words into indictments ; and it was holden, that if the description could properly be made by means of a Latin word or phrase, the latter could not be supplied by English words under an *Anglicé* (g) ; and therefore an in-

dictment was quashed, because the English word witchcraft was substituted for the Latin word *incantatio* (h).

But even then, when more slender exceptions were allowed to prevail than in later times, it appears that neither inelegant, nor even ungrammatical or false Latin, would vitiate an indictment if it did not render it unintelligible (i).

So that where *duo justiciariis* was inserted for *duobus justiciariis* (k), the indictment was still holden to be sufficient; and so was an indictment, which alleged that the defendant *super caput suum proprium* did forge, meaning that he did it of his own head (l).

But the misspelling of a word of art was generally considered to be fatal, as *burgariter* for *burglariter*, *feloniter* for *felonice*, or *murdredavit* for *murdravit*; and in numerous other instances, indictments were quashed upon very trivial exceptions to their language, as where *destric-tionem* (m) was used for *destructionem*; in others, the fault was holden to be cured by an explanation under an *Anglice*, as *pellices*, *Anglice* (n) skins; *ollis æriis* (o), *Anglice* brass pots. But the consideration of this class of cases is rendered useless by the statutes above cited. With respect to faulty or ungrammatical English, the courts have relaxed from that strictness, which was formerly so prejudicial to the administration of justice. If the objectionable word or sentence be wholly superfluous, it may be entirely rejected (p), according to the

(h) Dr. Lamb's case, 2 Hale.
169.

(i) 2 Hale, 169.

(k) Cro. Eliz. 108. 2 Hale,
169.

(l) 2 Lev. 221. 2 Haw. c. 25.
s. 87.

(m) Parker's case, Hutt, 56.

(n) 1 Sid. 318.

(o) Cro. J. 129. 2 Haw.

c. 25. s. 88.

(p) 2 Haw. c. 25. s. 87.

maxim, utile per inutile non vitiatur; and if one or more material words be misspelt, still the indictment will be good; unless by the alteration the word be changed into another of a different signification (*q*). But the misspelling of a name in setting out a record is fatal, although the word be *idem sonans* (*r*).

It seems that before the statutes 4 G. 2. c. 26. and 6 G. 2. c. 14. it was not allowable to express the year by means of common figures (*s*); but in setting forth the *tenor* of any writing in an indictment for forgery or libel, it is *still* necessary to copy the figures (*t*).

The charge must be direct and positive.

It has frequently been holden, that it is insufficient to allege a material part of the charge by way of recital, prefacing it with the words, “for that whereas, &c.”; therefore, where an indictment against the defendant, for having disobeyed an order of two magistrates, averred, that *whereas* the justices made an order, &c. the indictment was holden to be insufficient, for not directly averring that such an order was made, for without the order there could be no offence (*u*). But where the matter laid under a *quod cum* is *merely introductory*, the allegation will be sufficiently certain: thus an indictment for forgery, which alleged *quod cum testatum existit per quendam indenturam*, that J. S. demised, &c. and then averred, that the defendant falsely forged an assignment in writing

(*q*) *R. v. Beech*, Leach, 158. if the time otherwise appear.
Cowp. 230. 1 Mod. 78.

(*r*) *Brown v. Jacobs*, 2 Esp. 726. otherwise on a plea in abatement. (*t*) 2 Haw. c. 25. s. 87. 1 Salk. 195. 1 Mod. 78.

(*s*) Vide supra. The figures may be rejected as surplusage, (*u*) *R. v. Crowhurst*, Ld. Ray. 1363. *R. v. Whitehead*, Salk. 371. 2 Haw. c. 25. s. 60. 4 Co. 42. 5 Co. 150.

of that lease, setting out the tenor was holden to be sufficiently certain (x).

In Long's case (y) it was holden, that the averment *quod exoneravit tormentum dans plagam*, without saying *percussit*, was insufficient; and in Vaux's case (z), an indictment, alleging *quod nesciens potum fore venenatum bibit*, was holden to be vicious, for not saying expressly *venenum bibit*.

Where the character or situation of the defendant is an essential ingredient in the offence, it is sufficient, as has already been seen, to aver that he being so and so did the act, since no ambiguity can arise; but to allege that A. disseised B. of land *existens liberum tenementum* of B. would be bad, because it would be ambiguous whether the land was or was not B.'s freehold at the time of the disseisin (a), and no defect can be supplied by inference or intendment (b).

The charge must be single.

In a great number of instances it has been holden, that a charge in the disjunctive will avoid the indictment. As that A. *murdravit vel murdrari causavit, verberavit B. vel verberari causavit, fabricavit vel fabricari causavit*, for the charge is ambiguous (c). So it is insufficient, in an indictment for extortion, to allege that A. *existens servus sive deputatus* took, &c. (d).

But it has been holden, that circumstances necessary

(x) *R. v. Goddard and Carleton*, 3 Salk, 171. Ld. Ray. 1194. 2 Str. 904. Com. Dig. Ind.

(y) 5 Co. 122. but see Ld. Ray. 1363.

(z) 4 Co. 44.

(a) Bac. Ab. Ind. 556. See p. 151.

(b) Bac. Ab. Ind. 556. *R. v. Hazell*. 13 East, 139. Staund. c. 31. p. 96.

(c) 5 Mod. 137. Salk. 371. 2 Haw. c. 25. s. 58, 2 Str. 900. Rep. temp. Hardwicke, 370.

(d) 2 Roll. 263.

to bring th defendant within the purview of a statute depriving him of the benefit of clergy, may be disjunctively alleged. As where an indictment for robbery alleged it to have been committed in *or* near the king's highway (e).

And it is the usual practice to allege offences cumulatively, both at common law and under the description contained in penal statutes. As that the defendant published *and* caused to be published a certain libel, that he forged *and* caused to be forged, &c. In Fuller's case (f), it was objected that the second count of the indictment comprehended two distinct offences, viz. an endeavour to seduce, entice, and stir up M. L. to commit mutiny and also an endeavour to seduce, entice, and stir M. L. to commit traitorous and mutinous practices. But as the first count of the indictment was holden to be sufficient, the judges gave no opinion upon the second; Mr. Baron Perryn, however, observed, that it would probably be found to be a sufficient answer to this objection that though this charge might have been branched out into separate offences, the whole might be but the parts of one fact of endeavour, which must be stated as it is.

And it is the common practice to allege, in the same count of an indictment, the stealing of several articles, though the taking of each would constitute a distinct felony. And if any of these be uncertainly or improperly expressed, the indictment will still be good as to the rest; and in general where an indictment is defective as to some particulars, but sufficient as to the rest, it will be void only as to the first, and remain good as to the residue (g).

On the other hand it is necessary that every distinct

(e) 1 Hale, 535.

(f) Leach, 916.

(g) 2 Haw. c. 25 s. 47. 4 St.

Tr. 718. Fost. 194.

count in an indictment should contain a distinct and complete charge; and, therefore, where a statute inflicts a heavier punishment on an offender who commits the offence a second time within a limited period after the commission of the first offence, the indictment (*h*), to subject the offender to such heavier punishment, must allege the commission of the two offences in the same count (*i*).

A second charge in the same indictment ought to be prefaced by an *ulterius præsentant* which must be alleged to be on the oath of the Jurors. (*k*)

Without inconsistency or repugnancy.

It seems to be clear, that any inconsistency in material allegations, will vitiate the indictment. Thus, an indictment was holden insufficient which alleged the forgery of a writing, by which A. was bound to B. (*l*); "that A. disseised B. who had no freehold (*m*);" "that A. murdered J. S. at B. where he was wounded, the death having been laid at C. (*n*);" "the selling by false weights and measures;" "the being absent from church for six months between two specified days, which comprised an interval of eleven days only (*o*)."

It frequently happens that an averment is faulty, because it is either inconsistent with the fact, or is repugnant to other parts of the indictment, or is in itself insensible and absurd, will not be fatal. For, according to the salutary and equitable maxim, "*utile per inutile non vitiatur*;" and the general rule is, that if the defec-

(*h*) *R. v. Tandy*, Leach, 970.

(*l*) 3 Mod. 104. Bac., Ab.

(*i*) For instances of indefinite allegations, see chap. X.

Ind. 556.

(*k*) Per Holt, *C. J. Cranburn's Case*, St. Tr. 8 W. 3. *Trobridge's case* cited by Shower in *Cranburn's case*,

(*m*) 2 Haw. c. 25. s. 62, Bac. Ab. Ind. 556.

(*n*) 2 Haw. c. 25. s. 62. 2 Haw. c. 23. s. 88, 89. 2, Hale, 188.

(*o*) *Ib*,

tive averment might, without detriment to the indictment, have been *wholly* omitted, it shall be considered as surplusage, and disregarded (*p*).

Thus, in an indictment for arson, an allegation that the offence was committed in the night-time need not be proved (*q*).

So if an indictment for robbery from the person aver it to have been committed on the high-way (*r*), or in the dwelling-house (*s*) of a person named, it would be unnecessary to prove these allegations, for they form no part of the legal description of the offence, and might have been wholly omitted without any injury to the charge.

So where an indictment charges an offence, at common law, to have been committed against the form of statute the conclusion may be rejected (*t*). And *the general rule is*, that all unnecessary words may, on motion in arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out (*u*). In Redman's case (*x*) the indictment alleged that the defendant received goods, *knowing the said goods to have been feloniously stolen*, and upon motion in arrest of judgment, it was holden that the words *to have* might be rejected. So (*y*) where an indictment alleged that the defendant

(*p*) 2 Haw. c. 25. s. 87.
1 Mod. 78.

(*q*) *R. v. Munton*, East. P. C. 1021. under the st. 9 G. 1. c. 22. although the stat. 22 & 23 C. 2. on which the indictment was drawn, mentions time as an ingredient in the offence.

(*r*) Supra, 178. Wardle's case, East, P. C. 785.

(*s*) *Ib.* & Pye's case, E. P. C. it. Larciny, s. 168.

(*t*) *R. v. Mathews*, Leach. 664. 2 Haw. c. 25. s. 115, Doug. 445. Cro. Eliz. 750. 2 Hale, 171. but see 2 Hale, 173.

(*u*) Leach, 536. 1 T. R. 322. Com. Dig. Pleader, C. 28, 29. F. 12. 4 Co. 41. 2 Mod. 327.

(*x*) Leach, 536. *tamen qu.* for the sense is not complete without the words, *to have been*.

(*y*) *R. v. Edwards and Morris*, Leach, 127.

FRANCIS *Morris*, the said goods above-mentioned, so as aforesaid feloniously stolen, taken, and carried away feloniously did receive and have, he the said THOMAS *Morris*, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away. And the twelve judges held, that the words "he the said Thomas *Morris*," might be struck out as unnecessary, and that the indictment was sensible and good without them.

So where an indictment against a receiver, alleged the stealing of two bank notes, the property of Stephen Sullivan, and charged the defendant with having received the said notes, the property and *chattels* of the said Stephen Sullivan; it was objected that the notes being called property, as to the principal, could not be construed *chattels* as to the accessory: but the judges were unanimously of opinion, that the word *chattels* might be rejected as surplusage (z).

So where, by a penal statute, the whole of the penalty was given to the informer; it was holden, that an averment in the declaration that an action had accrued to the king, the poor of the parish, and the informer, might be rejected (a).

So where an allegation is inconsistent with precedent sensible matter, it may be rejected as surplusage. As if a declaration in ejectment lay the demise on the second of January, and aver that the defendant *afterwards*, to wit, on the first of January ejected him (b).

But a material allegation which is sensible and consistent in the place where it occurs, and which is not inconsistent

(z) *R. v. W. Morris*, Leach. 525. East. P. C. 593. 611.

(a) Andr. 67. Com. Dig. Pleader, C. 28.

(b) *Wyat v. Aland*, Salk. 324. Holt, 209. See also 2 Will. Saund. 291. n. 1. and the cases there cited.

with any antecedent matter, cannot be rejected merely because it is inconsistent with a subsequent material averment. And, therefore, where an indictment for malversation in office, alleged that the defendant, on the 1st of January, 1794, and for a long time thence ensuing, to wit, *until* the 29th of November, 1795, held and exercised the office, &c. and afterwards averred that the defendant, whilst he held and exercised the said office, to wit, *on* the 29th day of Nov. 1795, committed the act charged to be criminal; it was holden that the words under the first *scilicet*, “until the 29th of Nov. 1795.” could not be rejected as surplusage (c).

And if a matter be alleged which might have been omitted altogether, but which shews that the complaint is ill founded, it cannot be rejected as surplusage. As where an indictment against one for concealing the death of a bastard child, alleged the presence of an accomplice (d). So if a statute, which need not have been recited, be misrecited in a material part (e). So an indictment for forgery, which, after setting out the writing, alleged “by which A. is bound to B.” was holden to be defective (f). If the prosecutor, on an indictment for perjury, set out more than is necessary under the st. 23 G. 2. c. 11. he must set it out correctly (g).

In Heydon’s case (h) the indictment alleged the mortal blow to have been struck on the 4th day of August, and

(c) *R. v. Stevens and Agnew*, 5 East, 244.

(d) *Jane Peat’s case*, East. P. C. 229. And in declarations surplusage will be fatal, if it shew that the plaintiff has no cause of action, Com. Dig. Pleader, C. 29.

(e) Plow. Comm. 84. Com. Dig. Ac. on St. 1.

(f) Bac. Ab. tit. Ind. 556.

(g) *R. v. Dowlin*, 5 T. R. 317.

(h) 4 Co. 42. 2 Haw. c. 23. s. 89.

the death to have happened on the 19th day of December, and afterwards averred that several other defendants at the time of the committing of the said felony and murder; to wit, on the 4th day of August aforesaid, were present aiding, assisting, abetting, &c. the principal; and it was holden that the indictment was repugnant and insufficient as to the latter defendants, for no felony was committed till the death, and no one can be adjudged a felon by relation. So if the stroke be laid at A. and the death at B. an allegation that the defendant murdered the deceased at A. will vitiate the indictment (*i*), although a general averment that the defendant murdered the deceased would have been sufficient.

And Lord Hale, in the case of *Duppa v. Mayo* (*k*) held, that where that which is averred under a *scilicet* shews judicially that the party pleading *has mistaken the law*, the wrong conclusion in law will render the declaration insufficient, though it might be otherwise where the fact is mistaken.

It is usual in criminal, as well as in civil pleadings, to allege circumstances of time, place, number, quantity, magnitude, &c. under a *videlicet* or *scilicet*, whose office it is to *explain* that which has been alleged before (*l*).

The use of these terms, in pleading, seems to be comprised within very narrow limits. It has been said, and seemingly with great correctness, that where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is *absolutely nugatory*, and therefore not traversable; and if it be repugnant to the premises it shall not vitiate the plea, but the *scilicet* itself shall be rejected as superfluous and void; but where the precise time is

(*i*) Bac. Ab. tit. Ind. 556.

(*k*) 1 Saund. 287.

(*l*) 2 Wils. 233. *Knight v.*

Preston, Saund. 118. 170.

the very point and gist of the cause, there the time alleged by the *scilicet* is conclusive and traversable, and it shall be intended to be the true time and no other, and if impossible or repugnant to the premises, it will vitiate the plea, if true, will support the defence (*m*). These observations seem to contain the substance of all the decisions upon these allegations, and to be equally applicable to every other matter alleged under a *videlicet* (*n*). A particular allegation is either material or it is not; if it be material it is traversable, and must be as strictly proved when laid under a *scilicet*, as it must have been without one (*o*), and, when laid under a *scilicet*, cannot be rejected for the sake of a subsequent material allegation, which is inconsistent with it (*p*). If the allegation does not require strict proof, the absence of a *videlicet* will not render greater accuracy necessary, as to proof of the time, place, numbers, quantity, &c. alleged in the indictment.

It has, indeed, frequently been intimated, that an averment which, if pleaded under a *videlicet*, would not require strict proof, must, without one, be proved as laid; and that, therefore, where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet* (*q*). But this doctrine must, at

(*m*) By Mr. J. Blackstone whilst at the bar, 1 Black. *Bishop of Lincoln v. Wolner-ton*, cited and approved of by Mr. Serj. Williams, 2 Will. Saund. 291. n. 1.

(*n*) See 2 Will. Saund. 291. n. (c).

(*o*) 1 Str. 233. 3 Burr. 1729. 1 Saund. 169. 2 Wils. 332. 6 T. R. 460. 4 T. R.

590. *Pope v. Foster*, 5 T. R. 71. The day upon which money is alleged to have been advanced is material, though laid under a *videlicet*, Harris, q. t. v. Hudson, 4 Esp. 152.

(*p*) *R. v. Stevens and Agnew*, 5 East, 244.

(*q*) 2 Will. Saund. 291. *R. v. Aylett*, 1 T. R. 63.

In the case of *Symonis v.*

all events, be understood with very considerable restrictions; for, it is perfectly clear, that the king is not in general bound by either the day or place laid in the indictment, though averred without a *scilicet*. In prosecutions for murder, a variance from the instrument will not be material, provided the kind of death agree with that which is stated. So, in indictments for extortion, or taking a greater sum for brokerage than is allowed by an act of parliament (*r*); and in many other instances, it is not necessary that the evidence should strictly correspond with the allegation of the sums stated, though they be specified without the aid of a *videlicet*.

Where indeed a fact is averred, which is to be proved by the production of a record or other written instrument, since it is necessary to aver that fact with time and place, care must be taken not to aver the time and place as descriptive of the record or other instrument; for if such an intention appear, a variance from such time and place will be fatal (*s*). And, therefore, to avoid all doubt in such cases, it is proper to aver the time and place under a *scilicet*; which shews unequivocally, that the averments are not used descriptively and substantially, but only formally. Thus, in an action for a malicious prosecution, the declaration averred, that “*afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due

Knor, 3 T. R. 68. the party pleaded, that such a sum was due and *no more*. And in the case of *Durston v. Tatham*, which was cited in the former, the sum stated without a *videlicet*, and by which the party was holden to be bound, was part of the consideration of the promise.

(*r*) *R. v. Gillham*, 6 T. R. 265.

(*s*) As by the words “*prout patet per recordum*,” 9 East. 160. *Purcell v. Macnamara*, and see *R. v. Payne* there cited, also *Green v. Rennett*, 4 T. R. 590. *Brisley v. Watson*. 2 Bl. R. 1050.

manner and by due course of law acquitted." By the record of nisi prius it appeared, that the acquittal took place on Tuesday next after the end of Easter term, yet the allegation was holden to be sufficient (t). And in general, whenever an allegation of time, place, magnitude, quantity, or any other circumstance, is necessary, but need not be exactly proved, care should be taken to avoid the use of such terms, as shall bind the prosecutor to a strict proof; and this is usually and technically done, by averring the time, place, or other circumstance, under a *videlicet* (u). It seems, however, that this intention may be manifested by other means; and the case of *the King v. Gillham* (x) is strong to shew, that the want of a *videlicet* will not render strict proof necessary of an allegation of any circumstance material in itself, but not otherwise requiring strict proof, where there are no words which show that the allegation was used as descriptive of any contract, record, or other instrument, with which it may be compared, and from which it varies. The defendant was indicted under the stat. 17 G. 3. c. 26. which prohibits any broker, &c. from accepting more than 10s. in every hundred pounds for brokerage, &c. The first count stated, that the defendant received 332l. 10s. as a gratuity or reward for soliciting and procuring the loan, and for the brokerage of the sum of 2450l. then and there advanced, &c. It appeared upon the trial, that the sum of 332l. 10s. was not received for

(t) *Purcell v. Macnamara*, K. B. Mich. 48 G. 3. Peake's Evid. 207. In the case of *Pope v. Foster*, 4 T. R. 590. the day of the trial was holden to be substantial, though laid under a *videlicet*.

(u) *Symmons v. Knox*, 3 T. R. 65.

(x) 6 T. R. 265. and see *R. v. Burdett*, 1 Ld. Ray. 149. 3 T. R. 632.

brokerage *only*, but that part of it was due to the defendant as an attorney, for having prepared the writings. But the court was of opinion, upon motion in arrest of judgment, that since the offence consisted in taking more than 10s. in the 100l. and that the judgment did not depend on the quantity of the excess, the variance was immaterial (y).

Effects of variance.

It has already been seen, that it is essential to every indictment that it should affect a formal accuracy in the description of persons, time, place, sums, magnitude, quantity, value, &c. (z).

But a variance in evidence from the statement, in respect of time, place, magnitude, &c. is never material, unless the time, &c. be of the essence of the offence, provided the description be in substance correct (a). And it seems to be a general rule, that wherever an allegation may be wholly struck out of the indictment, without injury to the charge alleged, it need not be proved (b).

It has already been seen what variance will be fatal in the description of a statute, public or private (c). With respect to the pleading of other documents, much depends upon the particular terms in which the indictment professes to describe the instrument, and upon the importance of the instrument itself.

For if it be introduced by way of inducement, and merely as collateral to other matter, a substantial descrip-

(y) 6 T. R. 371. So in an indictment for larceny from lodgings, the contract for the lodgings must be proved as laid. *R. v. Goddard and Fraser*, Leach, 617. 3d edit. and evidence of a separate contract

will not support an allegation of a joint contract.

(z) See chap. 10.

(a) See p. 170. 239.

(b) See p. 234. tit. Surplusage.

(c) See chap. 12.

tion will suffice, and a minute and formal variance will not be fatal. In May's case (*d*) the defendant was indicted for perjury, alleged to have been committed on the trial of an indictment for an assault. The indictment for the assault charged, that the prosecutor had received an injury "whereby his life was greatly *despaired of*." The indictment for perjury introduced the indictment for the assault in these words: "which indictment was presented in manner and form following, that is to say," and then set forth the indictment at length, with the exception of the word *despaired*. But it was holden, (*e*) that though the word "*tenor*" had so strict and technical a meaning as to render a literal recital necessary, yet that under the words "in manner and form following, that is to say," nothing more than a substantial recital was necessary.

In the case of *the King v. Lookup* (*f*), the indictment (for perjury) stated the bill in Chancery to be directed to Robert *Lord* Henley, &c. in fact it was directed to Sir Robert Henley, *knight*, &c.; but the objection was overruled.

In the case of *Hendray v. Spencer* (*g*), for permitting a defendant who had been arrested under a latitat, to escape, the declaration stated a latitat against Donner and J. Doe; the writ produced in evidence was against Donner and two others, and not against Donner and J. Doe, but Lord Mansfield overruled the objection (*h*).

(*d*) Leach, 227.

(*e*) By Mr. J. Buller.

(*f*) Cited in *R. v. Pippett*,
1 T. R. 240.

(*g*) Cited in the same case.

(*h*) See also *R. v. Pippett*, 1

T. R. 235. *Cuming v. Sibley*,
cited 1 T. R. 239. and *Shuttel-*
worth v. Pilkington, 1 T. R.
240. See *Frith v. Gray* cited
4 T. R. 561.

But if a material descriptive allegation be contradicted by the record produced to prove that allegation, the variance will be fatal.

Thus where judgment is alleged to have been given in such a term, *as appears by the record thereof, &c.* if in fact it appear from the record, that judgment was given in a different term, the variance would be fatal (*i*).

In an action for a malicious prosecution, the declaration alleged the plaintiff's acquittal "on Wednesday next after 15 days, &c. in the court of our said lord the king, before the king himself, at Westminster, before the Lord C. J. assigned to hold pleas before the king himself." From a copy of the roll it appeared, that the plaintiff had been acquitted at *nisi prius*, and the variance was holden to be fatal, since the words of the declaration are descriptive of a trial at bar (*k*),

An indictment for perjury stated, that the defendant went before a justice of the peace, and swore in substance and to the effect following, that is to say, "that the said S. N. on, &c. at, &c. made an assault upon her the said M. A. T. with an umbrella, and at the *same time* threatened to shoot her with a pistol;" the information was produced, and ran thus, "and at the same threatened to shoot her," &c. omitting the word *time*, and the variance was holden to be fatal. (*l*).

So in prosecutions for forgery (*m*), perjury (*n*), blasphemous or seditious words (*o*), libels (*p*), &c. where the indictment is founded upon the very terms and expres-

(*i*) *Rastall v. Stratton*, 1 H. B. 49.

(*k*) *Woodford v. Ashley*, 2 Camp. 193.

(*l*) *R. v. Mary Ann Taylor*, 1 Camp. 495.

(*m*) See p. 93.

(*n*) P. 109.

(*o*) P. 113.

(*p*) P. 113.

sions which have been used by the defendant, and which must be set out on the record, any variance affecting the sense will in general be fatal.

A variance from the description of the things alleged to have been stolen or forged is in general fatal. (q)

(q) As between Lion Rampant and a Lion Passant, on an indictment for forgery. Lee's case, Leach, 3d Ed. p. 464.

CHAP. KV.

Of Amendments.

BY the express provisions of the statutes of amendment, cases of treason and felony are exempted from their operation; and it has frequently been laid down, that the exception virtually extends to all criminal prosecutions, and that the proceedings in such cases are amendable according to the rules and practice of the common law only (a).

With respect to an indictment, since it is found upon the oath of a jury, there would be a manifest impropriety in making any alteration in it (b), which could possibly affect the sense, without their consent. Amendments of this kind have, in some cases, been made by the authority of the court even after verdict, but such instances are rare (c). In the second volume of Bulstrode's reports, Mr. J. Yelverton cites the case of two persons, who had been indicted before him for a capital felony: it appeared, that the indictment charged them in the singular number; on that account he staid the proceedings, and took the opinion of the judges; eight or nine of

(a) Burr. 2527. 6 Mod. 268.
1 Sid. 244. 1 Keb. 252. 1
Haw. c. 25. s. 97. 1 Salk. 51,
52. But qu. and see p. 253.

(b) Per Ld. Mansfield, Burr.
2569.

(c) 2 Buls. 35. and see 11 H.
6. f. 2. and f. 14. where a writ
of forger of false deeds was
amended by inserting *imagi-*
navit for *imaginatus est*.

whom (all who were present) clearly held, that the indictment was *good* and amendable; and he adds, that it was amended accordingly, and that both the defendants were executed (*d*).

Where an indictment appeared to be insufficient, either for its uncertainty, or for want of proper legal words, it was anciently the practice to award process to the grand jury, if the court sate in the same county, to come into court to amend it (*e*). And it is the common practice at present to amend indictment in matters of form, whilst the grand jury are before the court; for which purpose they formally give their consent, that the court shall amend matters of form altering no matter of substance.

And it seems, that a rule may be made upon (*f*) the coroner, to amend the body of his inquest by his notes in mere matters of form, and before it is filed.

But the same objection does not apply to other parts of the record extrinsic of the indictment itself; and it seems, that evident misprisions in mere matters of form, either in the joining of issue or setting out the process, are amendable at common law. In Harris's (*g*) case, the defendant having been found guilty of a nuisance, the record was removed into the Court of King's Bench by *certiorari*; and on examination it appeared, that no issue had been joined by the clerk of assize to the plea of not guilty; and though several years had elapsed, and Richard Warer, the clerk of assize, who ought to have entered the *similiter*, had died in the interval, the court or-

(*d*) See Mr. J. Powell's observation upon this case, 6 B. Ind. 12. 2 Haw. c. 25. s. 98.

Mod. 283.

(*f*) 2 Haw. c. 25. s. 97.

(*e*) 22 Ass. 73. 2 E. 3. 1.

(*g*) Cro. J. 502.

dered the words, *et Ricardus Warer, qui pro domino rege sequitur similiter*, &c. to be interlined. In an information (h) against the husband and wife for the recusancy of the wife, the appearance of both was recorded upon the roll with the plea of not guilty by the wife *alone*, upon which issue was joined. It was objected, that no issue was joined, for the plea of a feme covert was void; and that, though it appeared from the docket that both had pleaded, yet the roll being made up of a different term, could not be guided by the docket; but the court held that it was but the misprision of the clerk, and might therefore be amended.

So where a venire, directed *vicecomitibus* of Canterbury, was returned by J. S. *vicecomes*, it was holden that it might be amended on the affidavit of J. S. that there was no sheriff of the place but himself (i).

So in the case of the *King v. Hayes*, where the defendant was indicted for the forging a bond, upon the trial it appeared, that there was a variance between the *nisi prius* roll and the forged instrument upon which a special verdict was found. The prosecutor then moved, that the *nisi prius* roll might be amended by the record of the indictment which was right; and the court inclined to think, that this was amendable at common law, *since there was something to amend by* (k).

But it seems to be perfectly settled, that a discontinuance is not amendable in any criminal prosecution; and

(h) Cro. J. 529. *Parker v. Sir John Curson and his wife.* directed the amendment on another ground. *Ld. Ray.* 1518.

(i) 1 Sid. 244. *Keb.* 900, See also 1 Lev. 189. 3 Mod. 901. 8 Coke, 310. 3 Lev. 430. 167. Cro. Car. 144. *Palmer,*

(k) Str. 842. But the court 480.

in Tutchin's case (l), it was holden by Ld. Holt, C. J. and by Powell, J. that the issuing a *distringas corpora juratorum* tested on the 24th, the *venire facias* being returnable on the 23d, was a discontinuance, and that such a fault, even in a civil case, would not have been cured by the statute 8 H. 6, c. 12.

At common law the court may amend their own misprision, or even their own judgment, or any other part of the record in the same term, for *during the term*, the record is in the breast of the judges (m).

Where an indictment has been removed into the Court of King's Bench from an inferior court, the general rule seems to have been, that the record might be amended according to the truth, if by the aid of any existing document it could be so amended. Thus the body of an indictment from London may be amended; because, by the city charter the tenor i. e. a copy only can be removed from thence, and the original remains a certain guide for the amendment (n).

So it has always been the common course to direct the caption of an indictment to be amended by the clerk of the assizes, so as to make it agree with the original record (o). But with respect to amendments of this nature, a question of considerable difficulty has arisen as to the time of making such an amendment; for, according to the technical distinction, a record cannot be amended in a term subsequent to that in which it be-

(l) 6 Mod. 269. See Yel. 64.
Dyer, 346. 1 Ed. Ray. 1061. 3.
Mod. 335. 3 Bl. Comm. 406.
Comb. 73.

(m) Blackmore's case, 8
Co. 310.

(n) 2 Haw. c. 25. s. 97.

(o) Ib.

came a record (n) and in conformity with this maxim, the courts have frequently refused to amend the caption of an indictment in a term subsequent to that in which it came in and was entered of record (o).

But, in the case of the *King v. Christopher Atkinson*, it was solemnly decided, after a full consideration of all the previous cases, that a caption might be amended *after the term*, and made to correspond with the truth of the case. It appeared, that the defendant had been convicted at a session of oyer and terminer for the county of Middlesex, that the sessions of the peace, and of oyer and terminer for the county, are holden at the same time, and that the clerk of the peace had two printed forms of captions, the one applicable to indictments preferred under the commission of oyer and terminer, the other to those preferred under the commission of the peace, and that a junior clerk, upon the receipt of the *certiorari*, took by mistake a return of a caption of the peace, and, striking out the word *peace*, inserted the words *oyer and terminer*. The consequence was, that the caption was neither applicable to a session of the peace, nor to a session of oyer and terminer. The *certiorari* was returned in Easter term, 1783; the defendant was found guilty at the sittings after the next Trinity term, and in the Easter term following, the attorney-general moved to amend the return to the *certiorari*, by the commission, &c. according to the fact, and to amend the caption by the return.

(n) 1 Saund. 249. 2 Haw. 8 Co. 310. 2 Ld. Ray. 968. 6 c. 25. s. 97. Mod. 58. 1 Vent. 344. 2 Ld.

(o) See 2 Hale, 168. Sir W. Ray. 1029. 1 Str. 442. 1 Bac. Jones, 421. 1 Roll. Ab. 196. Ab. 89.

1 Sid. 175. 6 Mod. 273. 278.

This was opposed on the authority of the cases which have been alluded to, in answer to which the following authorities and cases were cited, *R. v. Percival* (p), *Oddington v. Darby* (q), *R. v. Wilkes* (r), Sir W. Blackstone's Commentaries (s), *R. v. Hockenhull* (t), *R. v. Hayes* (u), Harris's case (x), *Philips v. Smith* (y), Thorney's case (z), *R. v. Fairweather* (a), and *R. v. Ponsonby* (b).

Lord Mansfield afterwards delivered the judgment of the court in favour of the amendment, principally on the following grounds (c).

1. That the return of a caption to the court of King's Bench is merely a *ministerial* act (d), and that ministerial acts are amendable at common law at *any time* (e).

2. That the application was to make the copy the same as the *original*, and *not to alter* the original caption (f).

3. That the cases of the *King v. Hockenhull* and the *King v. Fairweather*, were authorities directly in point (g).

(p) 1 Sid. 244.

(q) 2 Buls. 35.

(r) 4 Burr. 2527.

(s) 3 Bl. Comm. 406.

(t) 3 Mod. 167. Comb. 73.

(u) 2 Ld. Ray. 1518. 2 Str.

843.

(x) Cro. J. 502.

(y) 1 Str. 138.

(z) Cro. J. 276.

(a) 1 Will. Saund. 249, n. 1.

(b) Ib. See also 39 H. 6. 40.

(c) See the reasons at length,
1 Will. Saund. 248, n. 1.

(d) See 1 Saund. 249, and
R. v. Hockenhull, 3 Mod. 167.

(e) See 1 Str. 136,

(f) According to the authorities, *R. v. Hayes*, Str. 843,
R. v. Alcock, 1 Sid. 155.

(g) The former of these was the case of an *information*, originally filed in the King's Bench, where the clerk of the crown office, in making up the memorandum, inserted *Martini* for *Hilarii*, and, after conviction, the court ordered the mis-

And Lord Mansfield further observed, that "even considering the caption as an original, it may be amended in analogy to the instances of amendment in civil cases at common law which have been allowed, though in fiction of law the original has been already removed; since at common law there is no distinction as to amendments between civil and criminal cases (*h*); and in civil cases there are innumerable instances in which amendments have been made by the record below. So coroners return original inquisitions, yet they may be amended in all points except the finding of the jury (*i*).

prison to be amended. 3 Mod. 167. 1 Will. Saund. 249. n. 1. In the case of the *King v. Fairweather*, 1 Will. Saund. 249. n. 1. it appears that the court ordered the caption to be amended in a subsequent term; but Mr. Serjeant Williams doubted whether this case could be considered as an authority, since the court made a rule absolute, in the first instance, for the defendant to withdraw his demurrer and plead *de novo*, and that the clerk of the peace should be at liberty to amend the caption, and pay the defendant his costs; and it is impossible to suppose that the court would have made such a rule absolute in the first instance, except by consent.

(*h*) Cro. J. 502. 276. 529. 2 Roll. Rep. 59.

(*i*) In Glover's case, 1 Sid. 259. the inquest found, that Glover *seipsum felonice submersus fuit*, without saying that he died. It was holden that this was matter of form and amendable; and Twisden, J. held, that an inquisition might be amended by the insertion of the word *murder*; and it was holden, that all matters of form were amendable by the coroner, but no matter of substance. See the form of awarding process to the coroner to come in and amend the inquisition. 8 H. 5. 8. 2 E. 3. 1. 18. See also *R. v. Harrison*, 1 Sid. 225.

" And in the case of the *King v. Wheatley* (k), the clerk of the peace for the county of Wilts was ordered to bring into court the original indictment against the defendant, in order that the defendant might be discharged, if upon examination it should agree with the indictment remaining in court, on account of its insufficiency. In the case of the *King v. Serjeant* (l) and others, the clerk of the assize for the county of Lincoln, was ordered to bring into court the whole bag or file of indictments found at the gaol delivery, together with the names of the jurors. And in the case of the *King v. Beach* (m), the clerk of the assizes for the county of Dorset was ordered to amend the certificate of the indictment against the defendant, according to the original. The certificate must mean either the caption, or the transcript of the indictment itself, and these authorities combat what is said in the case of the *King v. Alcock* (n). These cases shew, that previous to the reign of Charles the Second, as well as since, courts have proceeded on the same idea as a fundamental rule, that a fiction of law shall never prevail against the truth of a fact to defeat the ends of justice (o)."

Upon the authority of these cases it would probably be holden, that the caption of an inquisition before a coroner, or even the inquisition itself, is amendable in

(k) Mich. 3 J. 1.

(l) Hil. 3 J. 1.

(m) Mich. 7 J. 1. contra 1. Roll. Ab. 196. where the clerk of assize, certifying the record, omitted a continuance, and the court would not allow it to be amended. See 4 Mod. 396.

(n) 1 Sid. 155.

(o) See 1 Sid. 225, 259. Cro. Eliz. 258. Fitz. Amend. 35. Br. Amend. 80. 13 H. 7. 23. 11 H. 7. 21. In the case 44 E. 3. 6. the court ordered an *ex assensu partium* to be entered on the roll in a subsequent term. But see Br. Amend. 21.

matter of form after it has been filed, either in the same or in a subsequent term, though, according to Serjeant Hawkins (p), it has been holden, that the caption of an inquisition cannot be amended at any time after it has been filed, any more than the body.

With respect to criminal informations, it seems to be settled, that they, and the pleadings founded upon them, are amendable upon motion in court, or even before a judge at chambers, at any time before the trial, in matters of substance as well as of form, though if the alteration be material, leave is given to the defendant to alter his plea (q); for these differ most materially from indictments and inquisitions, inasmuch as they are prepared by an officer of the court, and not upon oath after an examination of witnesses.

And even after judgment the court will amend a mere clerical misprision, which does not occur in the body of the information. Thus where the clerk entitled the memorandum as of *Michaelmas* instead of *Hilary term*, the court held that the defect was amendable (r); and intimated that the defect was amendable by virtue of the stat. 8 H. 6. c. 12. which specially excepts appeals and indictments of *treason and felony* and outlawries for the same. This special exception following words in the statute of the most general and comprehensive nature, including “any record, process, word, plea, warrant of attorney, writ, parcel, or return, which for the time shall be,” ap-

(p) 2 Haw. c. 25. s. 97. But see the cases, p. 251, n. (o).	Ann. cited. Str. 871. 1 Lev. 189. <i>R. v. Goffe.</i> <i>R. v. Holland</i> , 4 T. R. 457.
(q) <i>R. v. Harris</i> , 1 Salk. 47. 50. Str. 871. <i>R. v. Charlesworth.</i> <i>R. v. Wilkes</i> , Burr. 2568. <i>R. v. Simmonds</i> , 10	(r) <i>R. v. Hockenhull</i> , 3 Mod. 167.

pears so strongly to indicate an intention on the part of the legislature, that the statute should extend to indictments for misdemeanors below the degree of felony, as at least to justify a slight degree of scepticism in respect of a contrary construction, and to warrant a brief inquiry into the authorities upon which that construction is founded. In the first place, Lord Coke, in *Blackmore's case*, in enumerating fourteen misprisions, which he says are not amendable by virtue of the stat. 8 H. 6. c. 12. asserts, that it does not extend to an appeal, nor to *pleas of the crown, for they are excepted*; which is a remarkable assertion, for the words of the statute give the judges power to amend "all that which to them seemeth to be misprision of the clerks in *any record, process, word, plea, warrant of attorney, writ, pannel, and return, except appeals, indictments of treason and felony, and outlawries for the same.*"

In *Tutchin's (s) case*, Mr. J. Powys expressed a direct opinion that the statute in question extended to crown cases which were not within the exceptions of the statute, since the purview of the statute is as express and general as it can be; and the exception but particular; and he added, that in *Lord Bridgwater's case*, Lord Hale thought the statute was not to be so restrained; but *Powel, J.* was of opinion, that the statute 8 H. 6. c. 12. was to be explained by the previous statute of amendment, 14 E. 3. c. 6. and that the exception in the statute of Henry was introduced *ex abundanti cautela*.

In the case of the *King v. Hockenhull (t)*, the court, as has already been observed, held that the statute did extend to criminal cases which were not excepted. Lord Hale (*u*), in his *Pleas of the Crown*, says, that none

(s) *Ld. Ray.* 1861. *Salk.* 51.

(t) 3 *Mod.* 167.

(u) 2 *Hale*, 193.

of the statutes of jeofails apply to indictments: but this must be understood as said in reference to the indictments of which he was then treating; namely, to indictments in capital cases, since in entering upon the subject he cautiously admonishes the reader that he intends to treat of those indictments only which relate to *capital offences* (x). Serjeant Hawkins lays it down as a settled rule, that no criminal prosecution is within any of the statutes of amendments, for which he cites Tutchin's (y) case and Reed's (z) case; but in the latter of those cases the defect was holden to be amendable at common law; in the former it was holden that the fault was incurable even by the statutes, supposing them to apply.

In Wilkes's (a) case, Lord C. J. Mansfield and Mr. J. Yates seem to have been of opinion, that the statutes of amendment did not apply to criminal cases; but it is to be observed, that there was no necessity in that instance to resort to the statute, for the amendment was clearly warranted by the established practice and usage of the court, and the question was, as to the alteration of a very material allegation in the information, to which the statute could have no relation whatever. Finally, notwithstanding the frequent acquiescence which has been yielded from time to time, by very eminent judges, to the broad position of Lord Coke, it is impossible to forget that this was founded either upon a misrepresentation of the statute itself, or upon a forced extension of its plain and literal sense; and it must be confessed that his opinion has been adopted without much investigation or argument, though not wholly without opposition. The courts have, in many instances, shewn a desire of avoiding the ques-

(x) 2 Hale, 165. c.

(y) 6 Mod. 268.

(z) 1 Sid. 66.

(a) 4 Burr. 2568.

ion, by making amendments as at common law, rather than avowedly under the statute, and no case appears in which an amendment which was allowable under the statute, but not at common law, has been applied for; and, therefore, there does not seem to be any express decision that the statute is inapplicable to criminal cases below the degree of felony. On the contrary, Hocken-hull's case is a direct authority on the other side.

With respect to amending *pleas*, &c. at the instance of the defendant, it was holden, in Knowles's case, that his plea to an indictment for murder might be amended after it had been filed and after the attorney-general had replied, and the court held, that before judgment, and whilst things were in *fiert* and agitation, they had authority over all the proceedings (b).

It has been said, that a verdict general or special cannot be amended by the notes of the clerk of assize in criminal, though it is otherwise in civil cases (c).

But in the case of *Eddowes v. Hopkins* (d), Ld. Mansfield mentioned the case of one Gibson who was convicted of robbery, and a mistake being discovered in the verdict, it was, on consultation with all the judges, corrected from the minutes signed by the jury, and the prisoner was executed. And the same was holden by Lord Mansfield in Hazell's case, upon a special verdict on an indictment for murder (e).

With respect to the judgment, the recording of it is an act so important in its nature, and is presumed to have been done with such deliberation and attention, that it cannot be altered either by the same court or by any other after it has become matter of record. In Wal-

(b) 1 Salk. 47. Holt, 530.

(d) Doug. 375.

(c) *R. v. Keat*, Salk. 47.

(e) Leach, 425. Buller J.

Bold's case; Salk. 53. Keil. 1. dissent. See Ld. Ray. 141.

cott's case (f) the judgment for treason was thus entered — "*quod interiora sua extra ventrem suum capiantur,*" omitting the words, "*ipso que vivo comburantur.*" Upon writ of error brought by his son, those who claimed the father's estate, under the king's grant, moved that the clerk of the indictments for London might attend, which he did, and produced the record of Walcott's attainder in court, and also the indictment on which he was tried; and it appeared, upon inspection, that the deficient words were amongst the minutes taken by him, and indorsed upon the indictment. It was then moved, that the record might be amended by the minutes, but the court refused the application, and the judgment was reversed for this defect.

(f) 4 Mod 395. The reversal was afterwards confirmed in the House of Lords.

CHAP. XVI.

*Of Process upon Indictments and Informations.***I. *In case of Treason or Felony, p. 272.***

1. *Of the Capias, and in what Cases more than one is requisite, p. 273.*

2. *Of the Exigent and Outlawry, p. 272.*

3. *Writ of Proclamations, p. 285.*

II. *In Case of Misdemeanors below the Degree of Felony, p. 287.***III. *In Case of Informations, &c. p. 292.*****IV. *Defects in Process, p. 293.***

AFTER an indictment has been found against a defendant, if he be not in custody, it is necessary to issue process for the purpose of bringing him into court to defend himself against the charge; for though a bill may be preferred and found against a person in his absence, this being merely an *ex parte* proceeding to which, if present, he could make no opposition, yet no indictment can be tried unless he personally appear; a provision founded upon a principle of equity in all cases, and the express enactment of the stat. 28 E. 3. c. 3. in capital ones, that no man shall be put to death without being brought to answer by due process of law (a).

After the indictment, in the usual order of the record, follows the *award* of process, whose different stages will next be briefly considered.

The first step in process upon indictment for treason

(a) 4 Comm. 318.

or felony is a *capias* (*b*); by which the sheriff is commanded, that he omit not, on account of any liberty &c. to take the defendant if he be found within his bailiwick, and to produce his body before the court, on a day named, in order to answer the charge.

If this writ issue from the King's Bench, it should be tested by the chief justice (*c*), or, during a vacancy, by the senior judge; if it issue from any other superior court, it should be tested by the first of those named in the commission (*d*); and if the indictment be taken before justices of the peace at sessions, though the process must be awarded by two at the least, the *capias*, it seems, may be tested by one (*e*).

In all cases, the writ must be in the name of the king (*f*), though, if it issue within a county palatine or liberty, it must be tested in the name of the owner of such county palatine or liberty.

This writ may be issued by the Court of King's Bench upon any indictment originally found there, or removed thither, directed to the sheriff of the county where the party is indicted; and upon a *non inventus* returned, and a *testatum* that he is in another county, the court may award the *testatum capias* into any other such county (*g*).

Justices of gaol delivery cannot issue a *capias*, for their commission extends only to the delivery of the gaol (*h*); but justices of oyer and terminer may issue the *capias*, and proceed to outlawry upon it; and so may justices of the peace (*i*).

(*b*) 3 Mod. 265. 2 Hale, 194.
2 Haw. c. 27. s. 15.

(*c*) 2 Haw. c. 27. s. 8. 2
Hale, 199.

(*d*) 2 Haw. c. 27, s. 8.

(*e*) Ib.

(*f*) 27 H. 8. c. 24. s. 3.

(*g*) 2 Hale, 198.

(*h*) Ib.

(*i*) 5 E. 3. c. 11. 1 F. 4. c. 1.

And Lord Hale was of opinion, that a coroner might make process of outlawry (*k*).

Justices of the peace in sessions are empowered by their commission to make and continue processes against persons indicted, until they can be taken, surrender themselves, or be outlawed; and the same authority is vested in them by the stat. 5 E. 3. c. 11. and 1 E. 4. c. 2.

Where the process is awarded from the King's Bench into any other county, there should be an interval of 15 days at least between the teste and return of every process; but where the process is awarded into the same county where the court sits, this is not necessary (*l*). Where it is awarded by the justices of oyer and terminer and general goal delivery, it is made returnable at the next session of oyer and terminer and gaol delivery.

The writ is directed to the sheriff, &c. of the county or division for which the court sits, before which the indictment was taken; but if the defendant dwell in another county, process may be directed thither by virtue of the statute 5 E. 3. c. 11. which recites, that divers persons, *appealed* or indicted of divers felonies in one county, or outlawed in the same county, had been dwelling or received in another county, whereby such felonious persons, indicted and outlawed, had been encouraged in their mischief, because they might not be attached in another county; and *enacts*, "That justices, assigned to hear and determine such felonies, shall direct their writs to all the counties of England, when need shall be to take such persons indicted." Since an *appeal* could not be taken before justices of the peace, it has been doubted, (*m*) whether *they* were within the meaning of this statute, but they certainly are within the express words of

(*k*) 2. Hale 199. 27 Ass. 47.

(*m*) 2 Haw. c. 27. s. 3.

(*l*) 2 Haw. c. 27. s. 16.

it; and the intention of the legislature would be in part frustrated by an exclusive construction. Independently of this statute, process by writ might be well awarded into any county of England, either by the King's Bench or by justices of eyre, &c. upon an indictment before them.

A *capias* may issue against a peer of the realm, in case of treason, felony, or breach of the peace (o).

The sheriff either brings the party into court upon the return of the *capias*, or returns *non est inventus*.

Upon the latter return, in cases of treason and homicide (p), the writ of *exigent* issues immediately; but, in indictments for any felonies but homicide, it appears to be doubtful, whether a second *capias* was not formerly requisite previous to the *exigent* (q); Lord Hale, however, expressly says, that the process in his time, in case of any felony, was one *capias* and then an *exigent* (r). But to this rule there are some exceptions (s).

1. In favour of those who are charged as accessories either before or after the fact; or, since their guilt is purely derivative, it is an incontrovertible rule, that no accessory can be convicted before the conviction of his principal, and as an outlawry in felony is equivalent to a conviction, it follows, that process of outlawry ought not to issue against the accessory previous to the outlawry of the principal.

2dly. In case of indictments of felony before justices in their sessions.

(o) 2 Hale, 199. Cro. Eliz.

(r) 2 Hale, 195.

503.

(p) 2 Haw. c. 27. s. 112.

(s) An *alias* and *pluries* were not unfrequent at common law.

(q) F. Cor. 184. 234. F.

See Trem. 280.

Exig. 3. 2 Haw. c. 27. s. 112.

2 Hale, 194.

3dly. In favour of those whose residence in another county renders further process necessary, according to the provision of several statutes.

1. In favour of accessories, the stat. 1 West. (*t*) recites, that it had been used in some counties to outlaw persons, being appealed of commandment, force, aid, or receipt, within the same time that he which is appealed for the deed is outlawed; and enacts, that none be outlawed upon such appeal, unless he that is appealed of the deed be attainted, so that one like law be used therein throughout the realm; and directs further, that their *exigent* shall remain, until such as be appealed of the deed be attainted by outlawry or otherwise.

This statute, it has been holden, extends to indictments as well as to appeals (*u*): for the reason of the rule comprehends both. They were both upon the same footing at common law (*x*), and the act itself, from its terms, appears to have been intended to remedy an abuse, which *partially* prevailed, and not to alter the practice at common law.

Where, then, one is charged in an indictment as the principal, and another as accessory, the process by *capias* is against all, but the *exigent* issues against the principal only; and the process should be continued, by *capias infinite*, against the accessory till the principal be outlawed, and then an *exigent* should issue against the accessory, because then the principal is attaint by the outlawry; and if the accessory appear upon the *capias*, he should be admitted to bail, and have the same day given by bail, till the process be determined against the principal (*y*).

(*t*) 3 E. 1. c. 14.

Brac. 127. Britt. f. 5. 2 Ins.

(*u*) Summ. 210. 2 Hale, 200.

183.

2 Ins. 183.

(*y*) 2 Ins. 183. St. 1 West.

(*x*) 2 Haw. c. 27. s. 129.

c. 14. Staundf. c. 17. f. 69.
2 Hale, 200.

If A. and B. be indicted as principals in the felony, and C. as accessory to both, it seems the *exigent* shall stay till both be attainted ; but he may be convicted upon an indictment, though it appear that he was accessory to the one only, yet it seems to be otherwise in case of appeals (*a*).

And if several be appealed, and some appear and plead in abatement of the whole writ, or in bar of the whole proceeding, the suit shall be continued against the defaulters by *capias* only, and no *exigent* shall be awarded till such plea be determined (*b*).

If the *exigent* issue against both principal and accessory, who are charged as such, the writ will be good as against the former, though not as against the latter (*c*) ; and should an outlawry be pronounced against the accessory, in such case he may traverse it, for its illegality is apparent upon the record (*d*). But upon an appeal, where the writ is general, and does not distinguish between principal and accessory, it is difficult to say how the accessory is to take advantage of the statute (*e*).

But if the appellant take out the *exigent* against all as principals, he is estopped from counting against any of them as accessories, according to the opinions of Staundforde, Lord Coke (*f*), and Lord Hale (*g*) ; this, indeed, has since been doubted by Serjeant Hawkins, on the ground that the defect consists in process only, and therefore is cured by appearance.

But it is to be observed, that here the defect does not

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| (<i>a</i>) 9 Co. 119. 2 Hale, 200, | (<i>d</i>) 2 Haw. c. 27. s. 130. |
| 201. 2 Ins. 183. 2 Haw. c. 27. | 43 E. 3. 17, 18, 34. |
| s. 132. | (<i>e</i>) 2 Haw. c. 27. s. 130. |
| (<i>b</i>) Sum. 210. 2 Haw. c. 27. | (<i>f</i>) 2 Ins. 183. |
| s. 118. | (<i>g</i>) 2 Hale, 200. see 7 H. 4. |
| (<i>c</i>) 4 T. R. 521. 2 Haw. c. | 27. F. Cor. 80. 40 Ass. 25. |
| 27. s. 131. 8 H. 5, 6. | |

rest merely in process, but causes upon the record a material variance between the process and count as to the subject matter of the charge and the character in which the defendant is accused: since it appears by the original writ, *capias* and *exigent*, that he is charged as a principal, and by the *count* that he is charged as an accessory only; and a variance of this nature, it is well known, was formerly fatal upon *oyer* and demurrer, even in civil proceedings.

2dly. By the stat. 25 E. 3. st. 5. c. 14. after a man is indicted of *felony* before justices to hear and determine in their sessions, it shall be commanded to the sheriff to attach his body by writ or precept of *capias*; and if the sheriff return that his body is not found, *another capias* shall incontinently be made, returnable in three weeks after; and in it shall be comprized, that the sheriff caused to be seized his chattels, and keep them till the return; and if the sheriff return that the body is not found, and the indicted cometh not, the *exigent* shall be awarded, and the chattels forfeit, as the law of the crown ordaineth; but if he come and yield himself, or be taken by the sheriff, or other minister, before the return of the second *capias*, then the goods and chattels shall be saved.

This statute does not extend to treason, and therefore, upon an indictment for that offence, the *exigent* must issue upon the return of *non inventus* to the first *capias* (g).

Neither does it extend to a court of *oyer* and terminer and general gaol delivery, but only to proceedings before justices at their general or quarter sessions. For the statute is in terms thus confined, and its provisions are wholly incompatible with a court of assizes and *oyer* and terminer, which never sits from three weeks to three weeks (i).

(h) 2 Hale, 194.

(i) *R. v. Yandell and others*,
4 T. R. 538. 2 Hale, 195.

Although the statute directs, that in the *alias capias* the sheriff shall be commanded to take the goods, yet this, it has been holden, is not essential to the validity of the *capias* itself (*k*).

3dly. By the common law, an *exigent* was never awarded to the sheriff of any county, but that in which the offence was laid (*l*), and no other *capias* was necessary.

This opened the door to a very vexatious practice: indictments were preferred in the *King's Bench*, charging persons with treason or felony committed in the county where the court sate, upon which a *capias* was awarded, returnable after an interval of two or four days, and then an *exigent* issued, whereby the goods and chattels of the party indicted became forfeited to the king. The statute 6 H. 6. c. 1. reciting this grievance, enacted, that before any *exigent* be awarded against any person indicted in the *King's Bench of treason or felony*, a writ of *capias* should be directed to the sheriff of the county wherein the party was named in the indictment, as well as a *capias* to the sheriff of the county wherein the party was indicted; and that such *capias* should have the space of six weeks at the least or longer, at the discretion of the justices, before the return; and that upon the writs so returned, the justices should proceed in the manner they had done before the statute; and that any *exigent* awarded, or outlawry pronounced, before the return of the same, should be void.

The statute, it is observable, applies only to indictments in the *King's Bench* of treason or felony.

The stat. 8 H. 6. c. 10. (*m*) recites, that many persons

(*k*) *R. v. Yandell*, 4 T. R. 537. *R. v. Morley*, Trem. 280. 3 Keb. 125.

(*l*) 2 Haw. c. 27. s. 119.
(*m*) Does not extend to Chester by 8 H. 6. c. 10. s. 6.

had been maliciously indicted and appealed of *treason*, *felony*, or *trespass*, in foreign counties, and by force of such indictments had been put in *exigent*, whereby their goods had been forfeited, and their lives placed in jeopardy; and for remedy thereof, enacts, that upon every indictment or appeal, by which any of the said lieges dwelling in other counties than those where such indictment shall be taken, to be taken hereafter before the justices of peace, or before any other having power to take such indictments or appeals, &c. before any *exigent* awarded upon any indictment or appeal in the form aforesaid to be taken, that presently after the first writ of *capias* upon such indictment or appeal awarded and returned, another writ of *capias* be awarded, directed to the sheriff of the county, whereof he which is so indicted is or was supposed to be conversant by the same indictment, returnable before the same justices or commissioners before whom he is indicted or appealed, at a certain day, containing the space of *three months* from the date of the said last writ, where the counties be holden from month to month, and where the counties be holden from six weeks to six weeks, he shall have the space of four months until the day of the return of the same writ. By which writ of second *capias*, be it contained and commanded to the said sheriff, to take him which is so indicted or appealed by his body, if he can be found within his bailiwick, and if he cannot be found within his bailiwick, that the said sheriff shall make *proclamation* in two counties before the return of the same writ, that he, which is so indicted or appealed, shall appear before the said justices or commissioners, in the county, liberty, or franchise, where he is indicted or appealed, at the day contained in the said last writ of *capias*, to answer, &c.; after which second writ of *capias*, so served

and *returned*, if he, which is so indicted or appealed, come not at the day of the said writ of *capias* returned, the *exigent* shall be awarded, &c.

By the stat 8 H. 6. c. 10. s. 6. if any person be indicted of felony or treason, and, at the time of the felony or treason supposed, was conversant within the county whereof the indictment or appeal makes mention, the like process shall be used against such persons as was used before.

The stat. 10 H. 6. c. 6. recites, that indictments and appeals, before justices and others, had been removed into the King's Bench and elsewhere, by *certiorari* or otherwise, unknown to the party so indicted or appealed, and thereupon was sued the common law process; and then directs, that the same process be used upon indictments removed by *certiorari* into the King's Bench, or into any other court.

Indictments of felony or treason, originally taken in the King's Bench, are not (it has been holden) within the statute 8 H. 6. c. 10. (n); but by the stat. 6 H. 6. c. 1. a *special* provision is made, that before any *exigent* awarded, the court shall issue a *capias* to the sheriff of the county where the indictment is taken, and *another* to the sheriff of that county whereof he (the defendant) is named in the indictment, having six weeks time or more before the return; and after these writs the *exigent* shall issue as before.

But since the party must have been conversant in the county where the offence was committed, he may be named of the place where the fact was committed in the indictment, and then the process is to go as at common law before these statutes; and where the felony is com-

(n) Qu. and see 2 Haw. c. 25. s. 124. but see 1 E. 4. 1. 19 H. 6. 2. Summ. 209. F. Process, 103.

mitted at A. in the county of B. the usual course is to allege, that J. S. late of A. in the county of B. &c. (o).

And if the indictment allege, that J. S. late of A. in the county of B. *aliàs* J. S. late of C. in the county of D. &c. no process shall go to the sheriff of the county of D. for the addition under the *aliàs* is neither material nor traversable (p). So, if the description be J. S. of A. in the county of B. late of C. in the county of D. the *capias* shall not issue to D. because the indictment supposes him to be conversant in B. when it was taken. But if the description be J. S. *late* of A. in the county of B. *late* of C. in the county of D. upon the return of a *capias* in the county of B. a *capias* with proclamations shall issue to the sheriff of D. by virtue of these statutes (q).

If the defendant be named of a county palatine, a *capias* must be awarded thither by virtue of the statutes (r), and it should be directed to and returned by the chancellor, &c. of such county (s), in case the chancellor omit to return it, it is said the *exigent* may be awarded without a *return*; but the statutes give no power of issuing the *exigent* until after the return, and the proper course in such case seems to be by motion to the King's Bench to enforce the return of writ (t).

Notwithstanding the provision contained in these statutes, that an outlawry pronounced contrary to their direction shall be utterly void; yet it has in many instances been holden to be merely voidable (u).

Of the exigent.

Upon a return of *non est inventus* to the first *capias*, in cases of treason or felony at common law, or to the second

(o) 2 Hale, 196.

Chester is excepted out of 8

(p) 2 Hale, 196. 1 E. 4 1. H. 6. c. 10.

(q) 30 H. 6. 2 Hale, 196.

(s) Ib. and Rastall, 52.

(r) 2 Haw. c. 27. s. 125. But

(t) See Cro. Car. 252, 253.

(u) 2 Haw. c. 27. s. 127.

or third under the above statutes, the writ of *exigent* is issued, whereby the sheriff is commanded to exact the defendant from county court to county court, until he be outlawed for not appearing, and if he should appear to have his body before the justices, &c. to answer, &c. Upon this the sheriff calls or exacts the defendant at five successive county courts, and if he does not appear he is outlawed by the judgment of the coroner, and thereupon the sheriff returns the whole special matter to the court.

If there were not five county courts between the delivery of the writ to the sheriff and the return-day, and the sheriff returns that the defendant has been exacted twice or oftener, and has not appeared, a special *exigent* is issued allowing the former exactions, and requiring the sheriff to proceed. But it is essential that the demand should be made on five successive county court days, and if there was any interruption an *exigi facias de novo* becomes necessary.

A return of outlawry upon the *exigent* must be certain in the following particulars:

1st. As to the place of holding the county court, which must appear to be within the county; and, therefore, it has been holden, in a series of instances, to be insufficient to return *ad comitatum meum tentum apud S. in com. Somers.* without saying *ad comitatum meum Somerset (x)*. But it is sufficient for the sheriff to return at my county of S. without saying county court. But if the return state the place where the county court was holden at the first exaction, it is sufficient, in stating the remain-

(x) Wilkes's case, 4 Burr. 2560. Whiting's case, 2 Roll. Ab. 802. 2 Hale, 203. but the return was amended according to a precedent in the time of E. 4. but see the case of Barrington, 3 T. R. 499. Plum's case, Latch. 210.

ing exactions, to allege, that they were made at my court holden at the same place (y).

2. The day and year of the king's reign upon which every successive exaction was made (z).

And, therefore, *anno regni dominæ reginæ*, without saying *Elizabethæ*, has been holden insufficient.

So the return will be bad if it appear that the interval between two exactions was less than a month (a).

So if the *exigent* be against A. and B. and the return is, that they did not appear without adding, nor did either of them (b).

3. It has been said, that the name of the coroner must be subscribed to the judgment of outlawry at the *quinto exactus* by the name of his office, except in London, where the mayor is coroner (c); but in the case of *the King v. Barrington* (d), it was holden to be sufficient, that the names of these by whom the outlawry was pronounced, and that they were coroners, appeared on record.

If the *exigent* be directed to a sheriff consisting of two persons, as in the county of Middlesex, it is sufficient to allege in the return, that the defendant was exacted at my county court (e).

It need not be expressly stated upon the record, that a writ of *capias* issued against the defendant; it is sufficient to allege, that the sheriff was commanded to take the defendant, &c. (f).

Neither is it necessary to aver upon the record, that

(y) 4 Burr. 2560.

(z) 2 Roll. Ab. 803.

(a) 2 Hale, 203.

(b) 2 Hale, 204. R. v. 528. 531. 521.

Almon, 5 T. R. 202.

(c) 2 Hale, 204. Cro. J. 531.

2 Roll. Ab. 801.

(d) 4 T. R. 542. Cro. J.

(e) Burr. 2560.

(f) *R. v. Perry*, 6 T. R. 573.

the writ of *capias* or *exigent* was sealed by the justices (g).

In cases of treason and felony, an outlawry thus pronounced amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country, and he is considered, for many purposes, as actually dead; but though the law will not permit one who has renounced all claim to its assistance, to derive benefit from any legal proceedings, it will not tolerate any wanton attempt on the life of the person outlawed; and although he was formerly said to have *caput lupinum* at the mercy of every one, it is now holden, that no man is entitled to kill him wantonly or wilfully, but in so doing is guilty of murder (h).

Such is the course of proceeding to outlawry, in cases of treason or felony, at common law. In addition to this,

The stat. 4 & 5 W. & M. c. 22. s. 4. after reciting that it is agreeable to justice that proceedings to outlawries should be as public and notorious in criminal as in civil cases, ENACTS, that upon the issuing of any *exigent* out of any of their majesty's courts, against any person or persons for any criminal matter, before judgment or conviction, there shall also issue a writ of proclamation bearing the same teste and return to the sheriff or sheriffs of the county, city, or town corporate, where the person or persons in the record of the said proceedings, is or are mentioned to be or inhabit, according to the form of the stat. 31 Eliz. c. 3. which writ of proclamation shall be delivered to the sheriff or sheriffs three months before the return of the same.

By the stat. 31 Eliz. c. 3. the sheriff is required to

(g) 4 T. R. 521.

(h) 1 Hale, 497. 4 BL. Comm. 47.

make three proclamations, one in the open county court, another at the general quarter sessions of the peace in those parts, where the party defendant at the time of the *exigent* awarded, shall be dwelling, and another one month at least previous to the fifth exaction, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said *exigent* awarded. And if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, and next adjoining to the place of the defendant's dwelling, and upon a Sunday immediately after divine service.

The stat. 4 & 5 W. & M. does not apply to any outlawry after conviction, for the words are *before* judgment or conviction (*i*).

The writ of proclamation, in conformity with the stat. 31 Eliz. c. 3. should command the defendant to render himself to the sheriff on or before the day of exaction, so that he may have his body before the justices on the return (*k*); and if it command him to appear before the justices on the return of the writ, the writ will be erroneous. But it is sufficient, if it appear by the record, that the defendant was required to render himself to the sheriff, so that the sheriff might have his body before the justices, &c. at the return of the writ (*l*).

Where the writ required the sheriff to proclaim the parties in open court in the *sheriff's county*, it was holden to be sufficient, though it did not say *county court* (*m*).

It is not necessary that the sheriff should allege in his return, that the person proclaimed did not render himself, though this is necessary in his return to the *exi-*

(*i*) Burr. 2559. 3 T. R. 501.

(*k*) 3 T. R. 501.

(*l*) 4 T. R. 521.

(*m*) 4 T. R. 521.

gent (n) ; but in his return to the writ of proclamations, he must especially shew how they were made, to enable the court to judge whether they were properly made or not (o).

In Barrington's case it was stated upon the record, that the writ of *capias cum proclamatione* issued on the 20th day of September, in the 27th year, by which the sheriff was commanded to take the defendant, and have his body before the justices, &c. at the general sessions of the peace next after the 1st of February next ensuing, to wit, on Monday, the 28th day of February, in the 28th year, &c. it appeared by the sheriff's return to the *exigent*, that the defendant was a fifth time demanded on the 21st day of February, in the 28th year, and did not appear, wherefore he was outlawed, &c.; so that it appeared, that the defendant had a day in court after his outlawry, and for this the outlawry was reversed upon a writ of error (p).

It need not be expressly alleged upon the record, that the writ was delivered to the sheriff three months before the return of it, provided the fact can be collected from the record (q).

II. Thus far as to process upon indictments for treason and felony.—Next, where an indictment has been found for a crime of an inferior nature, the first step in the process is a *venire facias ad respondendum* (r). On this the defendant is summoned, and if he do not appear, and the sheriff return that he has lands in the county, whereby he may be distrained, a *distringas* is awarded (s), and is

(n) 4 T. R. 521. *R. v. Morley*, Trem. P. C. Lilley's Ent. 560. Clift. Ent. 394. Thes. Brev. 172.

(o) 5 Burr. 2559.

(p) 3 T. R. 499.

(q) *R. v. Perry*, 6 T. R. 573.

(r) 2 Haw. c. 27. s. 9. The *venire* may be made returnable

immediately by the justices of oyer and terminer, by the King's Bench, in the same county, and by justices at the sessions by consent. 3 Salk. 371.

(s) 2 Haw. c. 27. s. 10. In case of trespass, a *capias* issues upon the return of the *venire*. 2 Hale, 194.

repeated from time to time, whereby he forfeits on every default the issues returned by the sheriff. But if upon the *venire* the sheriff return, that the defendant has nothing whereby he can be distrained, a *capias* issues, and then an *alias*, and then a *pluries* shall issue, and then the *exigent*, upon which the defendant may be outlawed (*t*). But if the prosecutor proceed to outlawry after judgment, one *capias* (*u*) only is necessary. Where a *capias* does not lie, as in proceedings against hundredors, corporators, &c. and against peers, except in cases of treason, or felony, or breach of the peace, the only mode of proceeding is by *venire* (*x*) and *distringas*.

But it was the usual practice before the stat. 48 G. 3. c. 58. for any judge of the court of King's Bench, upon certificate of an indictment found for a misdemeanor, to award a writ of *capias* immediately, in order to bring in the defendant (*p*). And in general, unless it be deemed necessary to pursue the offender to outlawry, a *capias* is issued by the court before which the indictment is found in the first instance. But if the process be continued to outlawry, a greater exactness is necessary, and after the appropriate writs have been issued in regular order, the offender is put in *exigent*, in order to his outlawry.

An outlawry in treason or felony, amounts, as has already been seen, to a conviction and attainder of the offence charged in the indictment, but an outlawry for a misdemeanor, enures only as a conviction of the contempt for not answering, which contempt is punished by the forfeiture of his goods and chattels (*z*), and all the profits of his real estate. This process lies upon criminal

(*t*) 2 Haw. c. 27. s. 10.

(*y*) 4 Bl. Comm. 319.

(*u*) 2 Haw. c. 27. s. 111.

(*z*) *R. v. Wilkes*, 4 Burr.

(*x*) Tidd's Prac. 110. 4th ed. 2533.

Burn's Jus. tit. Process, 80.

informations for offences at common law, as well as upon indictments and presentments (a).

The st. 48 G. 3. c. 58. enacts, that whenever any person shall be charged with any offence for which he or she may be prosecuted by indictment or information in his majesty's court of King's Bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit, or by certificate of an indictment or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant, under his hand and seal, and thereby to cause such person to be apprehended and brought before him, or some other judge of the same court, or before some of his majesty's justices of the peace, in order to his or her being bound to the king's majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer all and singular indictments and informations for any such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge or justice respectively, to commit such person to the common gaol of the county, city, or place, where the offence shall have been committed, or where he or she shall have been apprehended, there to remain, until he or she shall become bound as aforesaid, or shall be discharged by order of the said court, in term time, or of one of the judges in the said court in vacation, and the recognizance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or, in case of conviction, shall have received judgment for the same, unless sooner ordered by the said court to be discharged.

(a) 4 Burr. 2557.

By stat. 48 G. 3. c. 58. s. 3. where any person, by virtue of a warrant of commitment under that act, or by virtue of any writ of *capias ad respondendum*, issued out of the said court, shall be committed to and detained in any gaol for want of bail, the prosecutor may cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol, wherein such person is or shall be so detained, with a notice thereon indorsed, that unless such person shall, within eight days from the time of such delivery, cause an appearance, and also a plea or demurrer to be entered in the said court to such indictment or information, an appearance, and the plea of not guilty will be entered thereto in the name of such person. And in case he shall, thereupon, for the said space of eight days after such delivery, neglect to cause, &c. appearance, and also a plea or demurrer to be entered in the said court to such indictment or information, it shall be lawful for the prosecutor, upon an affidavit being made and filed in the said court, of a delivery of a copy of such indictment or information, with such notice indorsed thereon as aforesaid, to such person or to such gaoler, &c. which affidavit may be made before any judge or commissioner, &c. of the said court, to cause an appearance, and the plea of not guilty to be entered in the said court to such indictment or information for such person, and such proceeding shall be had thereupon, as if the defendant in such indictment or information had appeared, and pleaded not guilty, &c. (b).

By a late excellent act (c) made for the purpose of pre-

(b) As to the proceeding, where a person indicted for one part of the united kingdom escapes into another part, or into another county within the same

part, see the stat. 24 G. 2. c. 55. 13 G. 3. c. 31. 44 G. 3. c. 92. 45 G. 3. c. 92.

(c) 60 G. 3. c. 4.

venting delays in the trial of persons prosecuted for misdemeanors by indictment or information, in the courts of King's Bench, at Westminster and Dublin, and by indictment at the sessions of the peace, sessions of oyer and terminer, great sessions, and sessions of gaol delivery, in England and Ireland, it is enacted as follows :—

“ That from and after the passing of this act, where any person shall be prosecuted in his majesty's court of King's Bench at Westminster, or in his majesty's court of King's Bench in Dublin, respectively, for any misdemeanor, either by information or by indictment, there found or removed into the same respective courts, and shall appear in term time in either of the said courts respectively, in person, to answer to such indictment or information, such defendant upon being charged therewith shall not be permitted to imparle to a following term, but shall be required to plead or demur thereto, within four days from the time of his or her appearance ; and in default of his or her pleading or demurring within four days as aforesaid, judgment may be entered against the defendant for want of a plea ; and in case such defendant shall appear to such indictment or information by his or her clerk or attorney in court, it shall not be lawful for such defendant to imparle to a following term, but a rule requiring such defendant to plead may forthwith be given, and a plea or demurrer to such indictment or information enforced, or judgment by default entered thereupon, in the same manner as might have been done, before the passing of this act, in cases where the defendant had appeared to such indictment or information by his or her clerk in court or attorney in a previous term.

“ By the second section it is provided, that it shall be lawful for the said respective courts, or for any judge of the same respectively, upon sufficient cause shewn for that

purpose, to allow further time for such defendant to plead or demur to such indictment or information.

“ By section 3, that where any person shall be prosecuted for any misdemeanor, by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery within that part of Great Britain called England, or in Ireland, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, &c. unless a writ of certiorari for removing such indictment into his majesty's courts of King's Bench at Westminster, or in Dublin respectively, shall be delivered at such session before the jury shall be sworn for such trial.

“ By sec. 4. it is declared and enacted, that such writ of certiorari may be applied for and issued before such indictment has been found, in the like cases, in the same manner, and upon the same terms and conditions, as if such writ of certiorari had been applied for after such indictment had been found.

“ By sec. 5. it is enacted, that from and after the passing of this act, where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, &c. not having been committed to custody or held to bail to appear, to answer for such offence twenty days before the session at which such indictment shall be found, but who shall have been committed to custody or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session, he or she shall plead to such indictment at such subsequent session, and trial *shall proceed*

thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery, respectively, unless a writ of certiorari for removing such indictment into his majesty's courts of King's Bench, at Westminster or in Dublin respectively, shall be delivered at such last-mentioned session before the jury shall be sworn for such trial, any law or usage to the contrary notwithstanding.

“ By sec. 6. it is provided that the act shall not prevent indictments found by a grand jury of any city or town from being removed to an adjoining county to be tried. 38 G. 3. c. 52.

“ And by sec. 7. that the court may, on sufficient cause shewn, allow further time for pleading, &c.

“ By sec. 8. that in prosecutions by the attorney or solicitor-general, copy of the information or indictment to be delivered to the party.

“ By sec. 9. that in case such prosecution is not brought to trial within twelve calendar months, it shall be lawful for the court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days previous notice shall have been given to his majesty's attorney or solicitor-general, to make an order, if the said court shall see just cause so to do, authorizing such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nulle prosequi* shall have been entered in such prosecution.

“ By sec. 10. it is enacted, that nothing in this act contained shall extend or be construed to extend to any prosecution by information in nature of a *quo warranto*, or for the non repair of any bridge or highway.”

III. The stat. 21 J. 1. c. 4. directs that the like process

in every information (by a common informer) to be commenced, sued, or prosecuted by force of or according to the said act, be had and awarded to all intents and purposes as in an action of trespass *vi et armis* at the common law; and, therefore, the process must be by attachment and distress infinite, where by the return the party appears to be sufficient, otherwise by *capias* (d).

Process upon default.

If the defendant appear to an indictment of felony, and before issue joined make his escape, the process against him is by *capias* (e) and *exigent*, as before, unless there had before been an *exigent*, and in that case a new *exigent* (f) shall be awarded. If the default be after issue joined and an issue awarded to try it, then if he has been brought in upon a *capias*, a *capias ad audiendam juratam* should be awarded (g) against him. But where he has appeared upon the *exigent*, and makes default after issue joined, a new *exigent* should be awarded, and if he appear upon the new *exigent*, he should, according to Lord Hale (h), plead *de novo*; for, by the *exigent*, it seems both the issue and inquest are without day, but Serjeant Hawkins (i) is of opinion, that though the inquest is put without day by the *exigent*, it is not waived, and that the court may cause the same inquest to try the same issue, unless the defendant fail to render himself before the return of it.

IV. *Of defects in process.*

It would swell out this branch of the subject to an insufferable length, to detail the tedious string of decisions founded upon petit defects in process; it would not,

(d) See 2 Haw. c. 27. s. 13.

(e) 2 Haw. c. 27. s. 19.

(f) 19 H. 8, 1. 2 Haw. c. 27. s. 19.

(g) 2 Haw. c. 27. s. 19.

(h) 2 Hale, 225.

(i) 2 Haw. c. 27. s. 20.

however, be proper to dismiss the subject without some general observations.

1. A *discontinuance* is of two kinds, the first consists in suffering a total chasm in the proceedings, whether on the roll or in the process, by not giving a fresh continuance *instanter* upon the determination of the preceding one (*k*). As where a second writ is not tested on the day of the return of the preceding one (*l*), or where, after issue joined, the process is not continued, from time to time, against the jurors, returnable on the same day to which the suit is continued on the roll against the parties (*m*). And with respect to discontinuances of this description, it is a general rule that they are not cured by the appearance of the party, or even by his pleading over (*n*).

The second kind of discontinuance seems to consist of cases where, though there is an actual continuance upon the roll and of process, yet it is defective and void in point of law; as where a whole term intervenes between the teste and return of a *capias*, which the law will not permit least the defendant should be imprisoned an unreasonable time (*o*), but the same objection does not apply to continuance of an original by any other process, though a term should intervene between the teste and return (*p*).

So, if after issue or demurrer a day is given to a distant term without making any continuance to the next (*q*).

Or if any of the parties be described in any continuance of the suit, whether on the roll or by process,

(*k*) 2 Haw. c. 27. s. 102.

(*o*) 2 Haw. c. 27. s. 8. Dy.

(*l*) 1 Salk. 51. 6 Mod. 281. 175.

Yel. 204.

(*p*) Ib.

(*m*) 2 Haw. c. 27. s. 90.

(*q*) Cro. J. 236. Yel. 169.

(*n*) 1 Buls. 143. Yel. 204. 1 Buls. 144. 3 Buls. 233.

2 Haw. c. 27. s. 102.

by a name or addition which varies from the original (*r*); or if a *venire* omit any of the parties (*s*); or if a *venire* or *distringas* be issued without any award on the roll to warrant it (*t*).

But a discontinuance of this kind, the defendant having a day on the roll, is cured by his appearance (*u*); for, it has been asked, would it not be as trifling, to dismiss a person only in order to send for him again. And in criminal cases it could not but be of the utmost inconvenience to give the defendant, who is actually in the power of the court, an opportunity of escaping (*x*).

But a discontinuance of any kind, in process against jurors, has the same effect with a chasm in the process: but such a discontinuance will not abate the original proceeding. If it appear before the trial, the court will direct new process to be awarded where the first fault happened (*y*); if after trial, a new *venire*, to have the whole issue tried again, for the first trial was unwarranted. But if judgment be given on a verdict by a jury erroneously procured, it will be erroneous (*z*).

So it seems that any other error in the process against jurors, will occasion a *mistrial* as much as those which are termed *discontinuances* (*a*); as where an improper process (*b*) is awarded, where it is directed to a wrong offi-

(*r*) Br. Am. 22. 4 H. 6. 6. 6 Mod. 281. 1 Salk. 51. Cro. 40 E. 3. 18. 2 Haw. c. 27. J. 284.

89.

(*x*) 2 Haw. c. 27. s. 103.

(*s*) F. Dis. 10. 35. 2 H. 5.

(*y*) 19 H. 6. 39. 34 H. 6.

3. 2 Haw. c. 27. s. 93.

20. 2 Haw. c. 27. s. 104.

(*t*) F. Error. 16. 7 H. 6. 28.

(*z*) F. Jud. 12. Error, 16. 22 E. 3. 2.

(*u*) Buls. 141. Yel. 204.

(*a*) 2 Haw. c. 27. s. 105.

(*b*) 7 H. 6. 28.

cer (c), has a wrong (d) *venire*, misrecites former (e) process, is misreturned or not returned (f) at all. But if the error consists in a mere misprision of the clerk, and be discovered before trial, it seems to be amendable at common law (g).

2ndly. A *miscontinuance* appears to be any error in process which does not amount to a discontinuance.

It has not unfrequently been holden, that if a defendant, upon his appearance, expressly except to an inferior error of this nature before he has pleaded over, he ought to be discharged, and that new process should issue where the defect first happened; but stronger authorities deny this doctrine (h); from these it appears that, if the original be good, and the defendant be present in court, he shall be compelled to answer it notwithstanding any defect in the process, provided it do not amount to a discontinuance; for the end of a process is to compel an appearance, and that end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process as to let the defendant out of court in order only to have him brought in again in better form (i). In the case of *Widdrington v. Charlton*, it was resolved by the court of King's Bench, upon great deliberation, that the defendant upon an appeal of death coming in upon the *exigent*, which was erroneous for want of the words *de morte viri*, had cured the error by his appearance, although he cravedoyer of the process and demurred (k).

(c) Cro. Eliz. 574. 586. Yel. Sid. 100. 260. F. Error, 47. 46
15. 5 Co. 36. E. 3. 30. B. Error, 28. 2 Haw.

(d) Cro. Eliz. 468. c. 27. s. 102.

(e) Cro. J. 89. (i) 2 Haw. c. 27. s. 102.

(f) 8 Co. 310. 2 Haw. c. 27. (k) 10 Mod. 86. 1 Salk. 59.
s. 105. Note, Mr. J. Powell differed

(g) 2 Haw. c. 27. s. 105. from his brethren.

(h) 2 Haw. c. 27. s. 102.

3dly. A cause civil or criminal is put without day, when the justices before whom it is depending do not come on the day to which it is continued, the consequence of which is a discontinuance.

Upon such a discontinuance the ancient practice was to award a re-summons or re-attachment, which if special, revived the whole proceeding, if general, the original record only (*l*).

By the common law, all proceedings upon any indictment, information, or popular action, whereon no judgment had been given, were determined by the demise of the king, and nothing remained but the indictment, information, &c. which were put without day till re-continued by re-attachment (*m*), &c.; but by the stat. 4 & 5 W. 3. c. 18. and 1 Ann, c. 8. it is provided that such process, &c. shall continue in the same force after the king's death as if he had lived.

Although any error short of an actual discontinuance seems to be cured by appearance; yet, if a man be outlawed, or condemned by default for not appearing to process which is in any respect erroneous, he may for that error, avoid such outlawry or other condemnation, for no one shall be condemned for not appearing where that which should have compelled him to appear is erroneous (*n*). So if he were subject to any disadvantage in respect of such process, he may avoid it by insisting on the error (*o*); and, therefore, if a *pluries* or *exigent* be erroneously awarded, he shall not lose the advantage of appearing by attorney, or forfeit his goods, though he is liable to answer the original as if the error had not existed.

(*l*) 7 Co. 20. 2 Haw. c. 27. s. 101.

(*m*) 2 Haw. c. 27. s. 99.

(*n*) 2 Haw. c. 27. s. 107.

(*o*) See 2 Haw. c. 27. s. 106. and the authorities there referred to.

CHAP. XVII

Motion to quash the Indictment.

I. *At the Instance of the Prosecutor, p. 282.*

II. *Of the Defendant, p. 283.*

WHERE the indictment is defective, the court has a discretionary power to quash it in the first instance, without putting the defendant to plead to it (*a*).

But this is a matter of pure discretion, and will not be granted, as of course, at the application of either party (*b*).

And the defect itself must be very gross and apparent to induce the court to dismiss the indictment in this summary way, instead of leaving the party to his demurrer, motion in arrest of judgment, or writ of error, according to the regular mode of proceeding (*c*).

And, generally, the application should be made before plea pleaded (*d*).

The motion is made either by the prosecutor or the defendant.

(*a*) Com. Dig. Ind. H. Burr.
1127. 4 T. R. 135. 1 Sid. 54.
247. 2 Keb. 128. 1 Keb. 45.
Cro. Car. 584. Pal. 389. Salk.
372. 4 St. Tr. 134. Str. 602.
1 T. R. 316. 1 Wils. 325.
Ja. 27.

(*b*) Burr. 1127.
(*c*) 1 Bl. 275.
(*d*) 4 St. Tr. 673. Rook-
wood's case. Leach, 14. Frith's
case.

If the prosecutor move, the court will not quash the indictment unless it appear to be insufficient (*e*); nor even then, unless another has been found which is sufficient (*f*).

And will not quash it, of course, where the defendant has been put to expense (*g*).

And if a second indictment be found for the same offence, pending the first, the court will not quash the first unless the expenses incurred by the defendant, upon the first, be paid to him (*h*).

Where an indictment, removed by *certiorari*, was at issue, and the jury appointed, and the prosecutor afterwards procured a new indictment to be found, alleging the first to be defective, the court, upon consent of the parties, quashed the first and directed the second to stand in its place (*i*).

In case of removal by *certiorari*, the court will not quash the indictment after a forfeiture of the recognisance by not carrying the record down for trial (*k*).

And in general the application must be made before the defendant has pleaded (*l*).

When an information is filed by the attorney-general, *ex officio*, the court will quash it upon motion, if there be cause; but if the information be exhibited by a private person, the court will not quash it upon motion, because the defendant is entitled to costs (*m*).

(*e*) Doug. 240. 153.

(*f*) *R. v. Dr. Wynne*, 2 East, R. 226.

(*g*) *R. v. Webb*, 3 Burr. 1468. 1 Str. 946.

(*h*) MSS. Mich. Term, 53 Geo. 3.

(*i*) 6 Mod. 262.

(*k*) Salk. 380.

(*l*) Leach, 14.

(*m*) Per curiam, Fountain's case, Sid. 152.

Where the *defendant* moves, and the indictment plainly appears to be insufficient for the purposes of justice, the court will, it seems, quash it, except in some cases, where the nature of the offence renders it inexpedient to shew any indulgence to the offender. And this has been done, where the court, in which the indictment was found, *wanted jurisdiction*.

As where an indictment was found at the quarter sessions for perjury at common law (*n*).

For mere want of form; as where the indictment alleged, that it was presented, &c. without adding, on the oaths of 12 men, &c. (*o*).

For want of an addition after the first name the addition being inserted after the alias dictus (*p*).

The caption of an indictment was, "it is presented that the several *indictments* to this schedule annexed are true bills," and they were quashed upon the objection, that till found they are bills, and not indictments (*q*).

For misjoinder of defendants: as where an indictment charged six jointly or severally with exercising a trade (*r*).

Or charged several defendants with the same perjury (*s*).

For want of a substantial averment; as where an indictment for not receiving an apprentice did not aver that the binding was within the stat. 43 Eliz. c. 2.

So where the indictment for maintaining a cottage with-

(*n*) *R. v. Bainton*, Str. 1088.

(*o*) *R. v. Burhett*. Andr. 226.

(*p*) The objection may be taken on motion because it appears on the record, and the party is not put to his plea in Abatement, as where there is a wrong addition. *R. v. Ward*.

York Spr. Ass. 1820. ruled by Park, J. with the concurrence of Bayley, J.

(*q*) *R. v. Brown*, Salk. 376.

(*r*) *R. v. Weston*, Str. 623.

(*s*) *R. v. Phillips*, et al. Str. 921. see also 6 Mod. 210.

out laying four acres of land thereto, alleged, that the defendant maintained it for habitation, without saying that it was inhabited (t).

So where an indictment for saying to a justice "you do not right," did not aver that the words were spoken to the justice in the execution of his office (u).

Where the facts charged, supposing them to be true, did not amount to an indictable offence (x).

But the court has refused to quash indictments for offences of an heinous nature, such as treason and felony (y).

So in case of indictments for offences of a fraudulent nature.

As for cheating by false weights or otherwise (z).

And the court refused to quash an indictment for selling flour by false weights, though it appeared, on the face of the indictment, that the flour-scale was the lighter (a).

So in the case of the *King v. Wadsworth* (b), the court said it is against the course of the court to quash an indictment against a person for extortion or oppression.

So where an indictment charges any offence immediately affecting the public at large. Upon a motion (c) to quash an indictment upon the stat. West. 2. c. 4. for pulling down hedges, Lord Holt said, we never quash indictments for forgery, perjury, subornation, or any crime concerning the highways (d).

(t) *R. v. Burkett*, Andr. 230.

(u) *R. v. Leafé*, Andr. 226.

(x) Doug. 153.

(y) Com. Dig. Ind. H.

(z) 6 Mod. 42. 3 Burr. 1841.

(a) 3 Burr. 1841.

(b) 5 Mod. 13.

(c) *R. v. Inhabitants of Belton*, Salk. 372.

(d) 1 Sid. 140.

And upon a like motion, the court said, that they would not quash an indictment for enticing away another person's servant, upon motion, or for a nuisance, or for any heinous crime (e).

An indictment charged, that six defendants, along with several others, unlawfully assembled to disturb the peace, and broke and entered a lead mine, and unlawfully took and carried away a certain quantity of lead.

It was moved to quash the indictment on the ground that this was the subject matter of an action of trover or trespass, and not a matter of public concern. But the court, considering the number of persons collected together, held, that the defendants were not entitled to any indulgence; since this assembly was at a time in Cumberland when the judges were trying other persons for the like offence at Carlisle (f).

So the court refused to quash an indictment for a forcible entry (g).

For a disturbance in church (h).

Against overseers for refusing to pay over money to their successors (i).

But where the motion has been accompanied with a certificate that the nuisance complained of has been removed the court has quashed the indictment.

Since informations are preferred for great offences only, and such as are likely to prejudice the commonwealth, the court, it is said, will not quash one upon motion (k).

A motion may be made to quash an indictment on the last day of term (l)

(e) Salk. 372. r

(f) *R. v. Johnson*, 1 Wils. 325.

(g) 6 Mod. 95.

(h) Cro. Car. 584.

(i) *R. v. King*, Str. 1268.

(k) Vin. Ab. Inf. 415. i. e. at the instance of the defendant.

(l) Burr. 651.

With respect to indictments for high treason or misprision thereof (except only indictments for counterfeiting the king's coin, seal, sign, or signet) it is provided by the stat. 7 Will. 3. c. 3. that none shall be quashed for mis-writing, mis-spelling, false, or improper Latin, unless exception concerning the same be taken and made in court by the prisoner or his counsel assigned before any evidence given in open court upon such indictment; nor shall any such mis-writing, mis-spelling, false, or improper Latin, after conviction upon such indictment, be any cause to stay or arrest judgment thereupon. But nevertheless any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error in the same manner, and in no other than as if this act had not been made.

Under this statute it has been holden, that no such exception can be taken after plea pleaded (*m*).

(*m*) Rookwood's case, 4 St. Tr. 673. See East. P. C. 110.

CHAP. XVIII.

Arraignment.

IN all cases of treason and felony, and of misdemeanors, where the defendant is in custody (a) he is arraigned at the bar of the court; or, in other words, he is asked by the proper officer whether he is guilty or not of the offence with which he is charged.

According to some authorities the accused should be brought to the bar for this purpose free from fetters, un-

(a) If the defendant appear upon an indictment of treason or felony, he is generally arraigned or put to plead immediately. Com. Dig. Ind. L. And the rule is the same in case of misdemeanor, if he appear upon the *capias*, for he was guilty of a contempt in not appearing upon the *venire*. Ib. So if he appear upon his recognisance, or if he appear in his own person in a case of privilege, Ib. But if the defendant appear upon summons to a *venire* or *subpoena*, he is entitled

to an imparlance. Seven Bishops' case, St. Tr. And if he plead immediately, he need not try till the next term. But if he does not plead, until he be served with a *peremptory rule*, he must give bail to try it at the same term. The *Queen v. Orbell*, 6 Mod. 42.

If the defendant plead in court, he is committed till trial, unless he give security to try at his own charge; and if he plead in the office, the plea is not to be received without giving such security. 6 Mod. 114,

less some danger be apprehended. But in Layer's case (b), and in subsequent (c) instances, the courts have distinguished between the time of arraignment, and the time

Com. Dig. Ind. L. But if the defendant be committed, the prosecution must be maintained at the prosecutor's expense. 6 Mod. 114. Upon an indictment for mayhem, though it be laid *felonice*, it is not necessary that the defendant should be brought to the bar to plead, but his plea may be delivered in the office, since the judgment does not now affect life or member. Str. 1100 *R. v. Haydock*.

Upon a demurrer to the defendant's plea, upon an indictment for a misdemeanor, besides the common four-day rule to join in demurrer, there must be a peremptory rule giving him a day certain in the discretion of the court, without which judgment cannot be signed against him. *R. v. Johnson*, 6 East, 383.

In capital cases no rule is given to plead, or to join in demurrer, for all proceedings in such case being at bar, the prisoner is bound to answer instantly; but in prosecutions for misdemeanors, two four-day rules to plead are given, and a

peremptory rule moved; and then, if there be a demurrer, one four-day rule to join in demurrer is given.

When the party appears at the sessions according to his recognisance to answer an indictment, which indictment has been found, the usual course is for him to enter into a recognisance with two sureties, to try at the sessions following.

If a man be bound by recognisance to appear and plead to an information the first day of term, and is charged upon appearance with an information, if the information be laid in Middlesex, he has all that term for time to plead to it, so that he cannot be tried that term; but in case it be laid in another county, he shall have time to plead till the next term. 2 Salk, 514. The practice as to the time for pleading in case of misdemeanors is now materially altered by the stat. 60. G. 3. c. 4. above cited. c. XVII.

(b) 6 St. Tr. 230.

(c) See Waite's case, Leach, 33.

of trial, and have refused to liberate the prisoner from his irons whilst he was arraigned.

For the purpose of identifying the person of the prisoner, it is usual to direct him to hold up his hand, but this ceremony is not essential; the object is answered if the prisoner admit that he is the same person (*d*).

The indictment is then read over to him, and he is asked, whether he is guilty of the crime (*e*) whereof he is indicted or not guilty, and he then either stands mute, or confesses the fact, or pleads to the indictment.

The entry of the arraignment upon the record is in this form: "And being brought to the bar here, in his own proper person, he is committed to the marshal, &c. And being asked how he will acquit himself of the premises (*in case of felony*, or of the high treasons, *in case of treason*,) above laid to his charge, saith, &c."; and the record, it seems, would be erroneous, if it omitted so important a part of the proceeding (*f*).

Where there are two indictments against the defendant for the same offence, it is usual to arraign him upon both, and to try him upon both at the same time (*g*).

At common law, a man appealed of several robberies may be severally arraigned and tried on each appeal (*h*); in order that each appellant may be equally entitled to restitution of his goods; and so he may upon several indictments, for each prosecutor is entitled to a restitution of his goods upon conviction, by virtue of the stat. 21 H. 8. c. 11.

(*d*) 2 Haw. c. 28. s. 2. 4 Bl. Comm. 323.

(*e*) Whilst indictments were drawn in Latin, the arraignment was in English, by virtue of the stat. 37 E. 3. c. 15. See also 4 G. 2. c. 26. 6 G. 2. c. 6.

(*f*) 3 Mod. 263. 2 Haw. c. 28. s. 6. But qu. whether necessary in case of an appeal.

Ib.

(*g*) *R. v. Culliford*, Saik. 382.

(*h*) 2 Haw. c. 28. s. 7.

An accessory may be arraigned, but it seems clear, that he cannot be tried before the principal has appeared, unless at his own request (*i*) ; and even then, if he be convicted, judgment should be respited until the conviction, &c. of the principal.

Where the attainder of the principal was prevented by his death, by his standing mute, challenging above 35 jurors peremptorily, where he was admitted to the benefit of clergy or pardoned, the accessory could not be arraigned (*k*) ; and yet in these cases, the reason why the accessory shall not be tried before his principal, viz. least the conviction of the accessory should be contradicted by an acquittal of the principal, seems to fail ; for in such cases, the principal could not afterwards be acquitted, and therefore the absurdity could not arise.

But by the stat. 1 Ann. sess. 2. c. 9. s. 1. if the principal be convicted, stand mute, challenge above 20 jurors peremptorily, the accessory shall be proceeded against as upon an attainder of the principal, although the principal felon be admitted to the benefit of clergy, be pardoned, or otherwise delivered before his attainder.

And at common law, it seems, that the death or pardon of the principal, *after his attainder*, would be of no avail to the accessory.

If there be several principals, and the defendant be indicted as accessory to one only, it is clear (*l*), that he may be tried as accessory to him, though the others have not appeared.

But if he be indicted as accessory to several, and one only has appeared, it has been questioned (*m*), whether he

(*i*) 2-Haw. c. 29. s. 45. 1
Hale, 623.

(*k*) Fost. 361.

(*l*) See 2 Haw. c. 29. s. 41.

(*m*) 2 Haw. c. 29. s. 46.
Summ. 222. 1 Hale, 624. Lord

Hale, upon the authority of

Gittin's case, Plowd. Com. 98.

can be tried as accessory after the conviction of the latter; but it seems now to be settled that he may (*n*), and that he may be convicted upon evidence of his being accessory to one, though he be charged as accessory to several.

If the principal and accessory appear together, and the principal plead the general issue, the accessory may be arraigned, and if he also plead the general issue, both may be tried by one inquest. But the principal must be convicted before the accessory; and the jury are charged by the court, that if they find the principal not guilty, they must acquit the accessory (*o*). But if the principal plead in abatement or in bar, the accessory is not arraigned till the plea of the principal be determined (*p*).

Where the principal and accessory are tried by the same inquest, it is competent to the latter to enter into a full defence of the former, and to avail himself of every matter of fact, and of every point of law tending to his acquittal; and when the accessory is tried after the conviction of the principal, and it appears, that the principal was not guilty of the felony as charged in the indictment, the accessory ought to be acquitted (*q*).

says, that in such case the court may arraign the defendant as accessory to him who has appeared, and that if he be acquitted, he may afterwards be indicted as accessory to the rest. See Staundf. 46. 7 H. 4. 36.

(*n*) Fost. 361. 9 Co. 119.

(*o*) 2 Haw. c. 29. s. 47. 2 Hale, 625.

(*p*) 2 Ins. 184. Fost. 360.

(*q*) Fost. 121. 365. 10 St. Tr. 417. *R. v. Smith*, Leach, 323.

CHAP. XIX.

Plea.

THE prisoner, being brought to the bar and arraigned, either stands mute, or confesses the charge, or answers in one of the following ways: 1. By a plea to the jurisdiction; 2. by a declinatory plea; 3. by a plea in abatement of the indictment for some defect contained in it; 4. by demurrer; 5. by a plea in bar; 6. by the general plea, that he is not guilty.

I. By a plea to the jurisdiction.

By this plea, the defendant totally denies the authority of the court to try him; as where an indictment for rape has been found before the sheriff in his torn, which he has delivered to the justices, then because the sheriff had no authority to take such an indictment, the defendant may plead to the jurisdiction without making any answer to the charge itself (*a*). So if justices of the peace should arraign a defendant for treason (*b*). But it seems, that the defendant cannot plead to an indictment before justices, that the offence was committed at some place beyond their jurisdiction, for this would amount to no more than the general issue (*c*). After a plea to the jurisdiction overruled, it seems that the judgment should

(*a*) 2 Hale, 256. 22 E. 4. 22.

(*c*) See Trem. P. C. 271.

(*b*) 2 Hale, 256.

in all cases be to answer over to the charge in the indictment (*d*).

II. *Declinatory pleas.*

These were of two (*e*) kinds: first, the plea of privilege of sanctuary; by which a defendant, who had fled to a place of sanctuary, claimed under certain restrictions protection from process, and a right of being remanded if taken against his will, without being compelled to answer in any court of justice. But this privilege was abolished in the reign of James the first (*f*). Secondly, the benefit of clergy; but since no advantage can now be gained by this plea, which the defendant would not be equally entitled to after conviction; and since he would, by pleading it, lose the chance of an acquittal, the benefit of clergy is rarely pleaded, but, if necessary, is prayed by the convict before judgment (*g*).

III. *By plea in abatement.*

Pleas in abatement are founded either on some defect apparent on the face of the record, or upon some matter of fact extrinsic of the record, which render it insufficient.

1. *On some defect apparent upon the record.*

A prisoner indicted for felony cannot be allowed to have a copy of the indictment, though it is otherwise in cases of treason and misdemeanors (*h*); but the court will order an indictment for felony to be slowly read over to the prisoner, to afford him an opportunity of taking exceptions or preparing his plea (*i*).

(*d*) *R. v. Holles and others*,
Trem. 302.

(*e*) 2 Haw. c. 32.

(*f*) 21 J. 1. c. 28.

(*g*) 2 Hale, 236. 4 Bl.
Comm. 333.

(*h*) In treason, which works
corruption of blood, and mis-
prision of treason, by virtue of
the stat. 7 W. 3. c. 3. See 2

Hale, 236.

(*i*) 2 Hale, 236.

It seems in general that any defect, which, in any stage of the criminal proceeding, will vitiate the indictment, may be taken advantage of by plea in abatement (*k*).

And some defects must be pleaded in abatement, if insisted upon at all; such as the want of an addition, or the insertion of an improper one. So under the stat. 7 W. 3. c. 3. exceptions to indictments for high treason, (whereby any corruption of blood may be made,) on the ground of mis-writing, mis-spelling, false or improper Latin, must be taken before any evidence given upon such indictment, and shall be no ground of arresting the judgment. But little advantage is in general to be gained by a plea of this kind; since, with a few exceptions, the defendant will be entitled to the advantage of his objection after the trial (*l*); and should his plea be allowed, the court would direct a new bill to be sent out to the grand jury, or, if they had been discharged, would detain the prisoner till the next assizes or sessions (*m*).

2ndly. *Upon such defects as arise from facts dehors the record.*

If the defendant be indicted by a wrong name, or be described by an improper addition, he may plead it; and if the fact be found for him, the indictment shall be abated (*n*). In case of misdemeanors, the defendant may plead misnomer by attorney (*o*). And in some instances, the plea has been allowed when made *ore tenus* (*p*). But regularly every plea of this kind ought to be tendered in writing (*q*), and should be verified by affidavit (*r*). In case of indictments, the defendant may plead misnomer

(*k*) 2 Hale, 236.

(*l*) 2 Hale, 237,

(*m*) *Ib.* 2 Haw. c. 34. s. 2. 237.

(*n*) 2 Hale, 238.

(*o*) 10 East, 83.

(*p*) Dean's case, Leach, 535.

(*q*) Laver's case, 6 St. Tr.

237.

(*r*) *R. v. Grainger*, 3 Burr.

1617.

either of his christian or of his surname, but he must in his plea set forth his real name, by which, upon a fresh indictment, he would be concluded (*s*). And the king may reply, that he is known by the one name as well as the other (*t*). But in an appeal such a replication is not allowable (*u*), and the appellant must take issue. To an indictment against Charles Knowles for murder, he pleaded, that his grandfather was created Earl of Banbury by letters patent under the great seal of England, which he produced in court; the attorney-general replied, that the defendant, on, &c. petitioned the lords in parliament to be tried by his peers; and that the lords disallowed his claim; the defendant demurred, and his demurrer was allowed on the ground, that the refusal of the lords could not operate as a judgment (*x*).

And in general, where a peer is named as a commoner, he may plead the misnomer in abatement, since the title is part of his name, and he ought to be tried by his peers; but in such case he ought to set forth the writ, &c. testifying his title upon the plea; because it is but a dilatory plea, and must be tried, not by the country (*y*) but by the record. But a plea that the defendant is a peeress by marriage, involves a question of fact extrinsic of the record, and must be tried by the country (*z*).

In all cases of felony, the defendant pleading in abatement should plead over to the felony; for he is not concluded by pleading a false fact (*a*).

But in case of misdemeanor and mayhem, the defen-

(*s*) 2 Hale, 238. and see p. Countess of Rutland's case. 35
43. H. 6. 46.

(*t*) 2 Hale, 238.

(*z*) 6 Co. 53. 2 Hale, 240.

(*u*) 1 H. 7. 29. 21 E. 3. 47.
2 Hale. 238.

(*a*) Dy. 88. 21 E. 4. 71.

Dean's case, Leach, 535. 3
Salk. 171.

(*x*) 2 Salk. 509.

(*y*) 2 Hale, 240. 6 Co. 53.

mission which confesses the facts, but submits the matter of law to the consideration of the court. The humanity which is constantly displayed in the administration of criminal justice; and which never permits an admission of guilt, in a capital case, to be recorded without reluctance, dictates, no doubt, a contrary course; but it is difficult to conceive that it is obligatory on the court, after deciding against the defendant on demurrer, to receive his plea of not guilty (n).

V. *Plea in bar.*

By a plea in bar the defendant shews, by matter extrinsic of the record, that the indictment is not maintainable. The most usual special pleas, in answer to a charge of felony, consist either of matter of fact mixed with matter of record, or secondly, of matter of record only. The former are of three kinds: 1. *Auter-foits acquit*. 2. *Auter-foits convict*. 3. *Auter-foits attaint*. Of the latter kind is the plea of *pardon*.

1. *Auter-foits acquit.*

This plea is grounded upon an universal maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence (o). There exists, however, one exception to this rule, the history of which is shortly this. Since an acquittal upon an indictment of homicide would have barred an appeal, it was deemed expedient, by the courts, to refuse to try an indictment until after the expiration of the year and the day limited for bringing an appeal; but, in the interval, it frequently happened, that the witnesses died or

(n) Since the demurrer is a plea, no judgment of *peine forte et dure* could be given, after it had been overruled; and therefore, if the defendant in such case refused to plead over, no

course remained but to pronounce sentence of death. 2 Hale, 257.

(o) 4 Co. 40. 2 Haw. c. 35. s. 1.

the whole was forgotten. To remedy this inconvenience, the stat. 3 H. 7. c. 1. enacts, that the indictment shall be proceeded on immediately at the king's suit, for the death of a man, without waiting for an appeal, and that the plea of *auter-foit acquit*, or *auter-foit attain*, upon an indictment, shall be no bar to an appeal.

The plea must shew, by proper averments,

1. *The manner and circumstances of the acquittal itself.*

2dly. *The identity of the offence.*

3dly. *The identity of the party.*

1. *The manner and circumstances of the acquittal itself.*

In the first place, the plea must set forth the substance of the record of his acquittal. There is a wide difference between the pleading a record of acquittal, and the pleading a record in bar of a civil action. In the latter case, if a record be pleaded in bar, the plaintiff shall have oyer of it, if it be a record of the same court; but if it be a record of another court, he must plead *nul tiel record*, and a day is given to certify the tenor of such record.

But in criminal cases, in order to avoid false pleas and surmises which would be productive of great delay, the defendant is required not only to shew the nature of the former prosecution and acquittal with certainty in his plea, but also to shew the record or its tenor to the court by producing or vouching it at the time he pleaded, for otherwise it would be in the power of the prisoner to delay his trial when he pleased, by pleading an acquittal in another court. In order to prevent this delay, he must shew the record, or vouch it, if it be in the same court, in the first instance (*p*), and is not to wait till *nul tiel record* be pleaded (*q*).

(*p*) Staundf. and 21 H. 7. 9.
contra.

(*q*) 2 Hale, 241, 243, 255.
Serjeant Hawkins is of a diffe-

rent opinion, 2 Haw. c. 35. s.
2. and cites 1 Ins. 128. and Bro.
Cor. 218.; but the former re-
lates to pleading in bar of a civil

But the court, upon application for that purpose by the defendant, will, in its discretion, respite his plea in order to the production of the record (*r*), or a certificate of its tenor in one of the following ways.

If the prisoner be arraigned in the King's Bench, the court will grant a writ of *certiorari* to remove the record before them, and respite his plea till the record be removed (*s*).

In other cases, if the record be not of the same court in which the defendant is arraigned, he may proceed by removing the tenor of the record of acquittal into chancery by *certiorari*, and then either producing it in court with his own hands (having it *en poigne*), or by procuring it to be sent by mittimus to the justices *sub pede sigilli* (*t*).

But the record must be removed by writ, though the justices may receive a record without writ, where it is to be proceeded on for the king (*u*).

The defendant being thus prepared with the record of his acquittal, or the tenor of it properly certified, must recite it in his plea, which for the truth of such recital refers to or vouches the record, (*x*) &c.

action only, and according to the latter, it was merely decided that the record ought to be brought before the court *by writ*, for in that case the record produced did not appear to be in any way authenticated, so that the case is no authority to shew that the record is not to be produced by some means or other. See Bro. Cor. 29. 11 H. 4. 41. 9 H. 7. 19. 26 Ass. 16.

(*r*) See 2 Hale, 243. 2 Haw. c. 35. s. 2.

(*s*) 20 E. 2. Coron. 232.

(*t*) 2 Hale, 242. 2 E. 3. 26. Coron. 150.

(*u*) 2 Hale, 242. 8 E. 4. 18. B. Cor. 218.

(*x*) It has hitherto been supposed that the defendant is pleading an acquittal in some court in this country whose record of the proceeding may by proper means, be procured.

And upon this recital the plea will fail, unless it appear that the defendant was *legitimo modo acquietatus* (y), by judgment either upon verdict or by battle. Hence, if a prisoner be committed on a charge of felony, but no bill be found, so that at the end of the sessions he is acquitted by proclamation, he may be afterwards indicted, for this is no acquittal.

So if A. in defending his house against burglars, kill one, and the matter be found specially by the coroner's inquest or grand inquest, whereupon he is discharged; he cannot, to a subsequent indictment for murder or man-slaughter, plead an acquittal by the grand inquest. But had he been indicted generally of murder or manslaughter, and pleaded not guilty, and the special matter had been found by the petty jury and judgment had been thereon given "*quòd eat inde sine die*," the plea of *auter foits acquit* to a second indictment would be sufficient (z).

An acquittal in fact is available by way of plea, without regard to any mistake or error on the part of the jury or of the court in which the verdict was given. And, therefore, though a judge should direct the jury to acquit the prisoner because the offence was not proved to have been

Where the defendant has been tried by a foreign tribunal, it seems equally clear that an acquittal will enure to his defence in this country; but in such case an exemplification of the record of his acquittal would probably be deemed necessary.

R. v. Roche, Leach, 160. B. N. P. 245. *Beak v. Thyr-*

whit, 3 Mod. 194. 1 Show. 6. 3 Keb. 785.

So an acquittal of murder at a grand sessions of Wales, may be pleaded to an indictment for the same in England. 2 Haw. c. 35. s. 10. 1 Lev. 118. 1 Sid. 179.

(y) 2 Hale, 243. 246.

(z) *Crompt. f.* 28. Bull's case, 26 Eliz. 2 Hale, 246.

committed on the precise day named in the indictment, the acquittal would nevertheless be a good plea to an indictment charging the offence to have been committed on a different day, since, technically speaking, the mistake lies not in averment (*a*).

And an erroneous judgment standing unreversed is a sufficient foundation for the plea (*b*), though, in strictness, a judgment against the king is to be taken *salvo jure regis* (*c*).

But this, it seems, is to be understood of a judgment erroneously given upon a verdict where the indictment itself is sufficient; for, in general, where the original indictment is insufficient, no acquittal founded upon that insufficiency can be available, because the defendant's life was never really placed in jeopardy, and, therefore, the reason for allowing the plea entirely fails (*d*).

But if, the *indictment itself being defective*, the jury find a special verdict, and upon the whole of the premises, the court adjudge in the common form, that the defendant "go thereof without day;" can the acquittal be pleaded in bar? in other words, is such an acquittal to be considered as founded upon the verdict or upon the defect in the indictment? In a case of this kind, Lord Coke says (*e*), the court is bound to look into the indictment, and if that be defective to presume that the acquittal was founded upon that defect, and not upon the verdict; and this is *said* to have been the (*f*) ground of the decision in Vaux's case (*g*).

(*a*) 2 Ins. 318. 2 Hale, 247.

(*b*) 9 H. 5. 2.

(*c*) 2 Hale, 247.

(*d*) 4 Co. 44, 45.

(*e*) 3 Ins. 314.

(*f*) 2 Hale, 248.

(*g*) 4 Co. 44, 45. The judgment *against* the defendant in a capital case is *quod suspendatur*, which is conclusive both as to law and fact. 2 Hale, 248. 3 Ins. 314. Admitting the

But if there be error in the process only, and the prisoner appear and is acquitted upon his plea of not guilty,

principle as laid down by Lord Coke, that where it is *doubtful* whether the judgment "*quod eat inde sine die*" was founded upon the special verdict or on the insufficiency of the indictment, the latter is to be presumed, it seems, to have been carried to a great length in Vaux's case; for it can scarcely be doubted that the judgment in that case was founded upon the *special verdict*. The circumstances of this remarkable case were shortly as follow:—Nicholas Ridley, the deceased, had been married many years without issue, and the prisoner, Vaux, pretending that if he drank a certain potion he would obtain issue, persuaded him to drink a mixture of cantharides which destroyed him; the indictment alleged that the said Nicholas Ridley *nesciens predictum potum cum veneno fore intoxicatum sed fidem adhibens prædic. persuasioni dicti Willielmi recepit et bibit* (without saying *recepit et bibit prædictum potum.*) Vaux pleaded not guilty, and the jury found "that the said Nicholas Ridley

was poisoned by the taking of the said cantharides, and that the said William Vaux *was not present* at the time when the said Nicholas Ridley took the said cantharides, but whether, &c."

Whereupon judgment was entered as follows: Upon which all and singular the premises being seen and understood by the court here, for that it seems to the court here, upon the whole matter *by the verdict aforesaid* in form aforesaid found, that the said poisoning by taking of cantharides, and the said procurement of the said William to procure the said Nicholas to take the said cantharides, in manner and form *as by the said verdict hath been found*, was not felony and wilful murder, *therefore* it is considered that the said William Vaux of the felony, &c. go without day.

The plain and obvious construction of this judgment seems to be, that the court being of opinion that the facts found by the special verdict did not constitute him guilty

this acquittal is pleadable (*h*). And if the prisoner be attainted, though upon an insufficient indictment, he cannot be arraigned again before the reversal of the judgment (*i*).

If a judgment in favour of a prisoner be reversed, upon a reversal of that judgment he is not to be executed upon the first indictment, though judgment of death ought to have been given upon it; but in *favorem vitæ* he shall be arraigned *de novo*, in order to give him the benefit of any other matter of defence (*k*).

2dly. *The identity of the offence.*

The plea must shew an acquittal from the offence charged *in law* and *in fact*.

1. *In point of law.*

The plea will be vicious if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.

Thus, if a man be acquitted when charged as *accessory* to a murder or robbery, he cannot plead the acquittal if he be afterwards charged as *principal* (*l*). But it is not necessary that the charges in the two indict-

of murder, *therefore* dismissed him. It is true that there is great reason to suppose, that the judges of assize thought that the actual presence of the prisoner at the taking of the poison was essential to the crime, but still the judgment was valid until a reversal. The doctrine expounded in this case does not appear to consist with the general principle on which the plea of *ante foit acquit* is said to

depend, since an acquittal upon a special verdict would leave the defendant exposed to a second prosecution, whenever a formal flaw could be detected in the first indictment at any subsequent period. See 2 Hale, 395.

(*h*) 19 E. 3. Coron. 444.

(*i*) 4 Co. 44, 45.

(*k*) 2 Hale, 247.

(*l*) Staundf. 105. 2 Hale, 244. 27 Ass. 10. Fost. 361. Coron. 200.

ments should be precisely the same, it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that which is specified in the second, however the two offences charged may differ in degree. By way of illustration, let it be supposed that one offence is made up of the circumstances A. B. and C. and that another more general offence consists in the circumstances A. and B. alone. If a prisoner were to be indicted for the more complex offence, consisting of A. B. and C. and upon trial the jury found the circumstances A. and B. but not the circumstance C. it would be the duty of the jury to find the defendant guilty of the more general offence. The inference then to be drawn from a total acquittal under such circumstances is, that he is not guilty of the more general offence, and therefore an acquittal from the more special ought to be a bar to the more general charge.

So if the defendant be first indicted upon the more general charge, consisting of the circumstances A. and B. only, an acquittal obviously includes an acquittal from a more special charge consisting of the circumstances A. B. and C. for if he be not guilty of the former, he cannot be guilty of those with the addition of a third. But if one charge consist of the circumstances A. B. C. and another of the circumstances A. D. E. then, if the circumstance which belongs to them in common does not of itself constitute a distinct and substantive offence, an acquittal from the one charge cannot include an acquittal of the other.

Now for the application of this doctrine. An acquittal upon an indictment for murder will be a good plea to an indictment for the manslaughter (*m*) of the same person ;

(*m*) 2 Hale, 246. Fost. 329.

and *converso* an acquittal upon an indictment for manslaughter will be a good bar to an indictment for murder (*n*), for, in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence; in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.

But it is no defence to an indictment for (*o*) burglary laid with an intent to commit a larciny, that the defendant has already been acquitted upon an indictment stating the same burglarious entry and the actual commission of the larciny; for though the burglarious entry be common to both indictments, it does not in itself constitute a substantive offence of which the defendant could have been found guilty upon the prior indictment; and as an actual larciny essentially differs from a mere intent, the defendant could not, upon the first indictment, have been found guilty of any part of the offence charged in the second, and therefore no inference in his favour can be drawn from an acquittal (*p*).

So the rule fails if the lesser offence be but a trespass, and the greater offence a felony, for upon an indictment for felony the defendant could not have been found guilty of the trespass (*q*).

Hence an acquittal of trespass will be no bar to an indictment for larciny (*r*).

But an acquittal upon an indictment of petit treason,

(*n*) 2 Hale, 246. Fost. 329. Abbot, Leach, 816, but see Kel.

(*o*) *R. v. Vandercomb and Abbot*, Leach, 816.; but see 2 Haw. c. 35. s. 6. Kel. 30. 52. 30. 52. 2 Haw. c. 35. s. 5. (*q*) 2 Haw. c. 35. s. 5. West-
beer's case, Leach, 15.

(*p*) *R. v. Vandercomb and* (*r*) *Ib.*

where it is alleged that the defendant traitorously and feloniously did murder, will be a bar to a subsequent indictment for the murder of the same person, because the defendant might, if guilty, have been convicted of the murder upon the first indictment (*s.*)

On the other hand, an acquittal of an indictment of murder, will be a good bar to an indictment for petit treason (*t.*).

If a man be acquitted as principal, he cannot plead an acquittal to an indictment against him as accessory after the fact, for the acquittal exculpates him from the fact only, and he could not have been convicted on the first indictment, upon proof that he was merely an accessory after the fact, by receipt or otherwise, and, therefore, as accessory, was in no jeopardy; and the same principle extends to the case of an accessory before the fact, which appears to have been the ancient law (*u.*), and to be the law at this day (*x.*), notwithstanding several authorities to the contrary, some of which are founded on the erroneous position that an accessory before the fact may be found guilty upon an indictment charging him as principal (*y.*).

2. Of the same offence in fact.

An acquittal may be pleaded to a second indictment which varies in many circumstances from the first, provided the defendant shew, by proper averments, that the charge is in substance the same.

For, notwithstanding many variances between the first indictment and the evidence, he might have been convicted

(*s.*) 2 Haw. c. 35. s. 5. Fost.
325. 328.

(*t.*) 2 Haw. c. 35. s. 5. 1
Hale, 378. tam. qu. and see
Fost. 104. 325. 328.

(*u.*) Staundf. 105. 2 Hale,
244. F. Coron. 424. 8 E. 2.

(*x.*) Fost. 362. 2 Haw.: .
35. s. 11. Dalis, 14. Summ.
266. *R. v. Atkins*, St. Tr. 20
Car. 2.

(*y.*) 8 H. 5. 6. F. Cor. 463.

upon proof of those facts which are alleged in the second indictment; and, therefore, upon the latter, it seems to be competent to him to reconcile, in his plea, all such variances as would not have saved him upon the trial of the first indictment (z). Thus, if he be acquitted upon an indictment charging the commission of a murder on the first day of March, in the 10th year of the king's reign, and he be afterwards indicted for a murder alleged to have been perpetrated on the 1st day of March, in the 12th year of the same reign, he may plead *auter-foits acquit*, alleging the supposed offence to be the same (a). So if a man be acquitted of the murder of John Stiles, and be afterwards indicted for the murder of John Nokes, he may plead *auter-foits acquit*, and aver the person to be the same, notwithstanding the variance of the surname, for a man may have divers surnames. But where the names are different, the defendant should aver that he is known by the one name as well as by the other (b). So an acquittal of a robbery laid to have been committed in one vill may be pleaded to an indictment for a robbery laid to have been committed in another vill, provided both lie in the same county; but he cannot plead an acquittal in the county of B. to an indictment for a robbery laid in the county of C. because the justices in B. could not have inquired into the robbery in C. (c). But if an indictment in the county of B. be removed into the county C. an acquittal in B. is pleadable (d).

If A. commit a robbery in the county of B. and carry the goods into the county of C. though he cannot be indicted of the robbery in C. he may of the larciny, and an

(z) 2 Haw. c. 35. s. 3. Co-
gan's case, Leach, 503. Keil.
58.

(a) 3 Ass. 15. 25 E. 3. Coron.
136. 22 Ass. 55. 2 Hale, 244.
2 Haw. c. 35. s. 3.

(b) 26 Ass. 55. Coron. 189.
11 H. 4. 41. 2 Haw. c. 35. s. 3.

(c) 2 Hale, 245. 4 H. 7. 5.

(d) 2 Hale, 245. 41 Ass. 9.

acquittal of such larciny would be no bar to a subsequent indictment for a robbery in B.; neither would such an acquittal be a bar to an indictment of larciny in B. for perhaps the goods were never brought into C. and then the offence in B. never came in question, and the felony in B. is a distinct offence from the felony in C. (e).

If a man steals goods in the county A. and carry them into the county B. and be acquitted of the larciny in B. according to the opinion of Serjeant Hawkins (f), it is reasonable that the acquittal should be pleadable in B. for otherwise, by a fiction of law, the party would be twice in jeopardy for the same offence, and he conceived that the identity of the offences might be collaterally tried by the court or by a jury of B. (g). Without presuming to contradict a doctrine strenuously contended for by so able a lawyer, it may be observed, that if the law be against such a plea, the offender himself created the difficulty, and his case is not more hard than that of one who having been acquitted of stealing the horse, may still, according to Lord Hale, be convicted of stealing the saddle (h), though both were taken at the same time.

Lord Hale says, if A. commit a burglary stealing goods, an acquittal of the larciny will be no bar to an indictment for the burglary, and *e converso* an acquittal of the burglary is no defence to an indictment for the larciny, for they are several offences; there may be burglary where there is no larciny, and larciny where there is no burglary (i). But perhaps this limitation ought to be applied, viz. provided the indictment for burglary lay the offence with an

(e) 2 Hale, 245.

(h) 2 Hale, 246.

(f) 2 Haw. c. 35. s. 4. See
2 Hale, 245. 41 Ass. 9.

(i) 2 Hale, 245. 2 Haw. c.
35. s. 3. Staundforde. 105. con-
tra.

(g) F. Cor. 189. B. Cor. 98.
41 Ass. 9. 3 Ass. 15. F. Cor.
160.

intent to steal, and not with an actual larciny; for if it be laid with an actual larciny, a general acquittal includes an acquittal of the larciny itself; and, on the other hand, if the defendant be not guilty of the larciny, he cannot be guilty of the burglary in which that larciny is made an essential ingredient (*k*).

Staundforde was of opinion, that an acquittal of homicide in one county, might be pleaded to an indictment for the death of the same person in another county, because the same person can be killed but once (*l*). But if the murder were really committed in the second county, the defendant was placed in no jeopardy by the inquiry in the first; if it was committed in the first, he is placed in no jeopardy by the indictment in the second, and, therefore, the ground of the plea entirely fails.

Cogan was indicted for publishing, as true, a certain forged will and testament, which, as set out on the indictment, began, "I, T. G. do hereby, &c." the instrument proved in evidence began thus, "T. G. do hereby, &c." and the variance was held to be fatal. He was afterwards indicted as before, except that in the recital of the will the pronoun *I* was left out, he pleaded *auter-foits acquit*, but the former record being produced, was holden to be insufficient to support the plea, since it was not legal evidence of his having been acquitted of the same offence, and the prisoner pleaded not guilty (*m*).

3d/y. He must aver that he was the person who was charged, 'amp;c. as well as that the offence is the same with

(*k*) See p. 305, 306. 326.

(*l*) Staund. P. C. 106. Qu. whether an acquittal by battle in an appeal, be a bar to an indictment. According to Lord Hale it is no plea, and he cites

F. Cor. 375.; but this is contested by Serjeant Hawkins, 2 Haw. c. 35. s. 7. to whom the reader is referred.

(*m*) 2 Leach, 503.

which he was charged. If he be described by different additions in the two indictments, he may reconcile the variance by an averment that he was the person named in the former indictment (*n*).

And upon the averment of identity of person, as well as of the identity of the offence in fact, the court may admit the identity without any confession by the king's attorney (*o*); or an inquest may be charged to inquire into it (*p*).

Plea of auter-foils convict.

As a man once tried and acquitted of an offence is not again to be placed in jeopardy for the same cause, so *a fortiori*, if he has suffered the penalty due to his offence, his conviction ought to be bar to a second indictment for the same offence, least he should be twice punished for the same crime (*q*).

After conviction the defendant either remains without receiving judgment or praying his clergy, or he prays his clergy without receiving judgment, or he receives judgment of death whereby he becomes attainted.

If the defendant, after conviction, remain without either receiving judgment or praying his clergy, he may be indicted for any other offence or even for the same (*r*).

But if the defendant, on being called to judgment, *pray his clergy*, the conviction is pleadable though he be not actually admitted to it (*s*).

(*n*) 2 Haw. c. 35. s. 3.
Summ. 246. Keil. 58.

(*o*) 26 Ass. 15. 2 Hale, 242.

(*p*) Rast. Ent. 385. 2 Hale,
243.

(*q*) 2 Hale, 251. 4 Co. 394.
2 Leon. 83.

(*r*) 4 Co. 45. Vaux's case.
Holcroft's case, 4 Co. 40. Kel.
103. 2 Hale, 251.

(*s*) 2 Leon. 160. 1 And.
68. 4 Co. 45, 46. 3 Ins. 161.

Salk. 63. 2 Hale, 250. 390.

It was formerly doubted whether a prisoner could plead his previous conviction where he had never been called upon for judgment (*t*). But it has been perfectly settled that he may, provided he pray his clergy, for otherwise he would be prejudiced by the delay of the court without any fault of his own, and if he could be precluded from pleading his conviction by the omission of court to call him to judgment, it would render this high privilege in favour of life precarious and discretionary. Not to say that a demand of clergy by a convict before he is called to judgment is in strictness as legal and operative as a demand after a call to judgment; and a right to clergy, and an obligation to allow that right, are reciprocal and correlative terms (*u*).

And, therefore, if the party pray his clergy, and the court will advise upon it though clergy be not actually allowed, he may plead the conviction (*x*).

Formerly a conviction of one offence *followed by the allowance of clergy* (*y*), was a bar to an indictment for any former felony, for the stat. 25 E. 3. c. 5. directs, that the clerk shall be arraigned of all his offences together, and then be delivered to the ordinary. Hence, by a delivery to the ordinary, the prisoner was holden to be virtually discharged from all former offences, whether clergyable or otherwise.

This defect was partially remedied by the stat. 8 Eliz. c. 4. which enacts, that the admission to clergy shall be no bar to an indictment for an offence previously committed whereupon clergy is not allowable.

(*t*) 1 Sid. 316. Kel. 106.

(*x*) 2 Hale, 251.

Dyer, 214. 2 Haw. c. 36. s. 14.

(*y*) But otherwise if clergy

(*u*) Armstrong v. Lisle, Skinn. 670. Kel. 93. 103. Salk.

had not been allowed. F. Cor. 394. 361. Staundf. 108. 2 Haw.

62. 2 Haw. c. 36. s. 14. See c. 36. s. 10.

Searle's case, Hale, 289.

By the stat. 18 Eliz. c. 7. s. 2. burning in the hand is wholly substituted in place of delivery to the ordinary; and every person admitted to his clergy shall answer such felonies or offences as he should have done if he had been delivered to the ordinary, and made his purgation. And, therefore, clergy discharges of all precedent offences which are within clergy, but not of such offences as are not within the benefit of clergy (z).

It has already been seen, that the stat. 3 H. 7. c. 1. takes away the plea of *auter-foits acquit*, or *auter-foits attaint* upon an appeal of death; but if a man, upon an indictment of murder, be found guilty of manslaughter, his conviction is pleadable to an appeal (a), for he is neither acquitted nor attainted; and for the same reason it seems, that a verdict finding a man guilty of homicide, *se defendendo*, would also be pleadable, as at common law, to a subsequent appeal (b). And, upon the same ground it has been doubted, whether a conviction of murder upon an indictment is not a bar to an appeal (c).

Of the plea of auter-foits attaint.

After an attainder, the party is, to many legal purposes, considered as actually dead, and to have forfeited all that he can forfeit; and, therefore, it would be superfluous to try him again (d). And even though the attainder is founded upon an insufficient indictment, yet as long as it subsists, it is valid and pleadable in bar (e). And it is immaterial, whether it was founded upon an indictment or an outlawry (f).

But this plea is never allowed to prevail, where a se-

(z) 2 Haw. c. 36. s. 11.

(c) See 2 Haw. c. 36. s. 17.

(a) 2 Haw. c. 36. s. 12. 4 Co. 46. Semble not.

2 Hale, 250. 4 Co. 45.

(d) 2 Hale, 250. 4 Bl. Comm.

(b) 2 Haw. c. 36. s. 17. 1 336. 6 H. 4. 6.

Im. 55. 4 Co. 45.

(e) 4 Co. 45. 2 Hale, 251.

(f) 2 Hale, 252, 253.

cond trial would answer any useful purpose (g); and, therefore, for the benefit of the king, or for the purpose of giving a private individual restitution of his property, an indictment is maintainable after an attainder: for example, a person, adjudged to suffer death for felony, may be indicted for treason committed either before (h) or after (i) the felony, to entitle the king to the escheat. So if A. commit a felony on the goods of B. and afterwards upon the goods of C. after an attainder upon the prosecution of B. he may be put to answer either an appeal or an indictment at the suit of C.; in order that the latter may have the benefit of restitution under the statute (k). But C. may have an inquest of office to inquire of the robbery, so as to entitle him to restitution without arraiging the party on the indictment (l).

And *a fortiori* for the sake of public justice, an attainted felon may be arraigned upon an indictment for another offence, in which he is a principal for the purpose of convicting the accessories (m).

The plea is valid only so long as the attainder remains in force; if, therefore, A. commit several felonies, and be attainted of one, and the king pardon that attainder and felony, he cannot be again indicted of the same felony, but he may be indicted of any other (n). So if a person attainted, after his attainder commit a felony, and the first be pardoned, he must answer an indictment for the latter (o).

(g) Staundf. 107, 4 Bl. Comm. 337.

(h) 1 H. 6. 5, Staundf. c. 37, f. 109.

(i) 1 Ins. 213.

(k) 21 H. 8. c. 11. Staundf. l. 3. c. 10.

(l) 2 Hale, 252.

(m) Popham, 107.

(n) 2 Hale, 253. 6 H. 4. 6. Coron. 227. 1 Ins. 213. contra.

(o) 6 H. 4. 6.

An attainder reversed for error cannot be pleaded, for a reversed attainder is no more to be considered than if it had never existed (*p*). The observations made upon the plea of *auter-foits acquit* are most of them applicable also to the pleas of *auter-foits convict* and *auter-foits attaint*. The record must be pleaded, must be produced, or vouched; averments of identity are requisite, upon which issue may be taken, which issue must be tried by the jury that is returned to try the prisoner, and he must plead over, not guilty to the principal charge (*q*).

If A. commit several felonies, and be attainted and pardoned of one, and to an indictment for another plead the attainder, the subsequent pardon may be replied (*r*).

Plea of pardon.

A pardon, when available to the prisoner, ought to be taken advantage of by means of a special plea, or upon a motion in arrest of judgment; for the corruption of blood, occasioned by an attainder, can be restored, by act of parliament only; but if the pardon be allowed in any stage before attainder, the corruption is prevented (*s*).

If the pardon be by letters patent under the great seal, they should be set out in the plea, and the defendant should make a profert of them (*t*).

The plea concludes thus: "*Quarum quidem literarum domini regis (ac dicti brevis, if there be a writ of allowance) prætextu, prædictus J. H. petit, quod ipse de præmissis per curiam hic dimittatur, &c.*;" and then the entry is, "*super quo visis et per curiam hic intellectis omnibus et singulis præmissis consideratum est, quod prædictus. J. H.*

(*p*) 4 Bl. Comm. 336.

(*q*) 2 Hale, 255.

(*r*) 2 Hale, 253.

(*s*) 4 Bl. Comm. 337.

(*t*) See Hambden's case, Trem. 312.

eat inde sine die ;" and in the margent of the roll this entry is commonly made, "*literæ patentes allocantur sine die, &c.*"

A prisoner pleading a pardon does not plead over to the felony, because the two pleas would be inconsistent. But if the pardon be deemed insufficient, he shall not be convicted, but *in favorem vitæ* shall plead over to the felony (u), and may plead the pardon even after conviction (x).

Where the guilt of the defendant depends upon the guilt or innocence of another, in relation to whom the offence is committed, he may plead the acquittal of that person in bar of the indictment against himself. Thus an accessory may plead an acquittal of the principal. So a gaoler, indicted for wilfully permitting a prisoner for felony to escape, or one indicted for the rescue of a felon, may plead the acquittal of that felon (y).

So if A. steal the goods of B. and break out of prison, he may be arraigned for the felony of breaking out of prison before an arraignment upon the principal felony. But if he be acquitted of the principal felony before he be arraigned of the breaking out of prison, he may plead the acquittal (z).

It is a general rule, that no *justification* can be pleaded to an indictment for treason or felony (a); for the fact is laid *proditorie* in the one case and *felonice* in the other,

(u) Ruttaby's case, 2 Hale, 256. 37 H. 8. B. Appeal, 122. but it was holden by Needham, J.

(x) *R. v. Arundell*, Trem. 271. 37 H. 6. 20. & 21. that, upon an indictment of murder, the

(y) 2 Hale, 254. defendant might plead, that in

(z) Mrs. Samford's case, 2 Hale, 255. an appeal before the constable and marshal of treason, the ap-

(a) 2 Hale, 304. 26 H. 8. 5. pellee killed the appellant.

and these allegations must be answered directly ; besides, under the general issue, the party will be at liberty to give any special defence in evidence, though the matter of fact be proved against him ; and, therefore, it seems the law will not allow him to limit his means of defence by a special plea.

The defendant, upon an indictment or information for a misdemeanor, may, it seems, plead any special matter which is, in law, a bar to the proceeding against him. Thus, if he fall within any exception or proviso which is not contained in the purview of the statute, he may, by pleading, shew that he is entitled to the benefit of that exception or proviso (*b*).

But if the defendant plead special matter in justification or excuse, he cannot also plead the *general issue* (*c*) ; yet he may plead the general issue as to part, and specially as to the residue (*d*). And though in a capital case an arraignment upon an indictment will be no bar to a second, to an information, *qui tam*, the pendency of a former suit may be pleaded in abatement (*e*). But if the first information be fraudulent it will be no bar to a second, and fraud may be replied (*f*). In Tremaine's Pleas of the Crown there is a plea of *son assault demesne* to an indictment of assault and battery ; but Lord Holt was of opinion, that such a plea could not be pleaded, and that the special matter ought to be given in evidence under the general issue (*g*).

It is a well known rule of law, that whatever the prosecutor is bound to prove under the general issue, the

(*b*) *R. v. Baxter*, Leach, 660. (*f*) Vin. Ab. Inf. 415. Noy.

(*c*) 2 Haw. c. 26. s. 62. 4 118.

Com. Dig. Inf. Str. 1044. 4
T. R. 701.

(*g*) Trem. 270. Holt, 172,
but see the pleadings, Trem.

(*d*) 2 Haw. c. 26. s. 62.

273. *R. v. Lovelace*.

(*e*) 2 Haw. c. 26. s. 63.

defendant may disprove by opposite evidence (*i*). So that whenever any person is charged with the repair of an highway against common right, he may be discharged upon the plea of not guilty. But if the indictment charge the inhabitants of a parish with not repairing an highway within the parish, since they are *prima facie* liable by the law of the land to repair that highway, they must set forth their discharge by means of a special plea (*k*), shewing who is liable to the duty of repairing. So the inhabitants of a county, if indicted for the non-repair of a bridge, or of the highway within 300 feet of the extremity of the bridge, must, to exonerate themselves, plead specially, that some other is bound by prescription or tenure to repair the same (*l*). Where different districts within a parish have been used to repair their respective highways, and the parish at large is indicted, the prescription ought to be pleaded, for if judgment should be given against the parish after verdict on not guilty pleaded, or by default, the judgment would be evidence of the liability of the whole parish to repair (*m*), though not conclusive evidence, if it could be shewn that the inhabitants of the district bound to repair the road had been guilty of any fraud, or if the districts exempted by prescription could shew that the defence was conducted without their privity or knowledge (*n*).

The proper form of pleading such a prescription seems to be this, each district claiming an exemption should

(*i*) 1 Str. 181. *R. v. Inhab. of Norwich*.

(*k*) 1 Vent. 189. 1 Ld. Ray. 725. 2 T. R. 111. 1 Mod. 112. *R. v. St. Andrews*, 1.

(*l*) 7 East, 588. 12 East, 192.

(*m*) Peake's Ni. Pri. 219. *R. v. St. Pancras*, 2 Saund.

159. n. 10.

(*n*) 2 Saund. 159. n. 10. Doug. 421.

state, in a separate plea to the indictment, "that the parish has been immemorially divided into a certain number of districts or townships called A., B., C., &c. and that the inhabitants respectively of the several districts, A. and C. (in which the highway lies), have been immemorially used and accustomed to repair and amend the several and respective highways, situate and lying in their said respective districts independent of each other; and that the said part of the said highway in the said indictment mentioned, lies in that part of the said parish called the district C. and by reason of the premises, the inhabitants of the said district ought to have repaired the same independent of the inhabitants of the said district of A. in the said parish (o)".

In charging an individual with the obligation to repair an highway, in an indictment or plea, in respect of his tenure of certain lands, it seems to be sufficient to allege, that he was bound *ratione tenuræ terræ*, without adding *sua*, for though it has been objected that *sua* ought to be added in order to shew an occupation by the defendant, the occupier, and not the owner being liable, the court held that *ratione tenuræ* implied such a tenure as made him chargeable (p).

Where the obligation arises from *tenure*, it is not necessary, either in an indictment or plea, to allege any title or prescription, because a prescription is implied in the estate of inheritance in the land (q); but where the obliga-

(o) 2 Will. Saund. 159. n. 10.

(q) See the observations of Serjeant Williams, 2 Saund.

(p) 1 Str. 187. 1 Vent. 331. 2 Will. Saund. 158. and Ib. n. 9.; but see 1 Haw. c. 76. s. 90. 5 H. 7. 3, pl. 8.

158. n. 9. Co. Ent. 358. a. Keil. 52. pl. 4. 1 Haw. c. 76, s. 8. Styles, 400.

tion arises from *inhabitancy*, a prescription must be alleged (*r*). And in conformity with this distinction, between an obligation to repair by reason of tenure and of inhabitancy, it has been holden, that an indictment against a particular part only of a parish for not repairing a highway in the parish, stating that the inhabitants of the district, from time immemorial, ought to repair and amend it, is insufficient; it ought to state, that the inhabitants of such district, from time whereof, &c. have used and been accustomed, and of right ought, to repair and amend it, for the inhabitants of a particular division of a parish are not bound to repair by common law, and therefore the indictment should shew the reason of their obligation (*s*).

But *an individual* cannot be bound by prescription, unless in respect of his tenure of land, taking of toll, or other profit; for the act of the ancestor cannot charge the heir without profit, though a corporation, or a parish, or part of it, may be charged by prescription to do so (*t*).

As a county may plead that an individual is bound to the repair of a bridge, so if that individual has been indicted and fined by the judgment of the court, the county may plead the conviction, setting forth the record and averring the identity of the bridge, &c. (*u*).

VL. *Plea—General issue.*

By the general plea, that he is not guilty of the treason or felony alleged against him, the defendant denies the

(*r*) 1 Haw. c. 76. s. 8.

(*s*) 5 Burr. 2700. 3 Keb. 301. 3 Bac. Ab. 58. 2 T. R. 111.

(*t*) 13 Co. 33. 1 Haw. c. 76. s. 8. 3 Bac. Ab. 58.

(*u*) Trem. P. C. 206. Ray.

384.; in a case of this kind it does not appear to be necessary that the defendants should be prepared with the record *en poigne*, as in case of a plea to an indictment for felony. See the precedent, *postea*.

whole of the charge, and he may give his special defence in evidence though the matter of fact be proved against him. And upon the defendant's giving special matter of excuse or justification in evidence, the jury are as much bound to take notice of it as if it had been specially submitted to their consideration by a special plea (x).

The defendant may have the benefit of this plea, in capital cases, after any special plea has been overruled (y), or even after a demurrer (z).

It has been said, that by pleading the general issue the defendant waives the benefit of a pardon under the great seal (a). But this position does not appear to be correct. In Arundel's case, the defendant pleaded the king's pardon after a conviction of homicide, and Sir Edward Coke, then attorney-general, replied to the plea (b).

And, in general, the pleading not guilty is no waiver of a special plea, and does not render it double (c).

But if A. having the king's pardon of manslaughter, be arraigned upon an indictment for murder, he ought not to plead not guilty, for he would thereby waive his pardon. He ought to confess the indictment as to the manslaughter and plead the king's pardon, and as to the killing with malice prepense he shall plead that he is not guilty. Then, if he were to be found guilty of murder, he would have judgment, if acquitted of the murder his plea would be allowed (d).

(x) 2 Hale, 258.

(y) 2 Hale, 257.

(z) 2 Hale, 257. contra.

(a) 2 Haw. c. 37. s. 59.

(b) Trem. 273. 6 Co. 14.

(c) 22 E. 4. 29. 2 Hale, 256.

(d) So ruled by Lord Hale in Sir Thomas Pettus's case,

24 C. 2. 2 Hale, 258. in conformity with the st. 13 R. 2. c. 1. which expressly requires that before any pardon shall be allowed, it shall be inquired by the county, whether the killing were of malice prepense, and if so the pardon shall be disallowed.

The plea to an indictment for felony consists of two parts; 1. The issue of *not guilty*, whereupon the clerk joins issue by the words *cul. prist.* 2. The putting himself upon the country, when the clerk demands how he will be tried.

And if either of these fail, the prisoner stands mute, whereupon he was formerly, in case of felony, put to his penance; but now, in case of both treason and felony (e), judgment is given and he becomes attainted (f).

Upon a criminal information or indictment for a misdemeanor, if the defendant do not plead, judgment is given as upon a conviction (g). Upon the plea of not guilty, issue is joined for the king, by the words A. B. *qui pro rege sequitur similiter, &c.*

And it seems that there is no necessity for any addition to shew that A. B. is the proper officer for this purpose, for it is to be intended that he was known to be such by the court (h). And in appeals of felony, whether by an appellant or an approver, issue is in general expressly joined by the appellant or approver (i).

It has already been seen, that where defendants are charged with the omission of the duty to the performance of which they are *prima facie* bound by the law of the land, they cannot discharge themselves under the general issue, but must set forth the grounds of their discharge by a special plea. But in all other cases the defendant is intitled to the benefit of his defence upon evidence under the general issue, and, therefore, a special plea is seldom resorted to (k).

(e) By stat. 12 G. 3 c. 20.

(f) 2 Hale, 258.

(g) 4 Bl. Com. 525.

(h) 2 Haw. c. 38. s. 2.

(i) Rastal, 42. 2 Haw. c. 38. s. 3.

(k) If after conviction the

defendant pray the benefit of the statute, the prosecutor should file a counterplea; for the form of this, and likewise of special replications in particular cases, see the PRECEDENTS.

CHAP. XX.

Of the Verdict.

- I. *General Verdict*, p. 343.
- II. *Partial Acquittal*, p. 346.
- III. *Special Verdict, finding the facts*, p. 351.

UPON a capital charge, a verdict cannot be given in the absence (*a*) of the defendant, and should be returned openly (*b*) in court; and the jury, just before they give their verdict, are required by the clerk of the arraigns to look upon the prisoner (*c*). But in case of a misdemeanor below the degree of felony, if the prisoner has appeared and pleaded, the prosecutor may proceed to trial, and a verdict may be given against him in his absence. According to ancient custom, and even according to the practice of criminal courts for a considerable space of time after the revolution, it was holden, that a jury sworn and charged in a capital case, could not be discharged until they had given a verdict, a rule calculated to give an offender one more chance of escaping, in case of the accidental inability or perverse default of a juror (*d*).

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| (<i>a</i>) 2 Hale, 298. | (<i>d</i>) Leach, 706. 3d ed. 2 |
| (<i>b</i>) 2 Haw. c. 47. s. 2. 1. Ins. | Hale, 295. Fost. 76. Ann Scal- |
| 227. 3 Ins. 110. | bert's case, Leach, 720. 4th |
| (<i>c</i>) Ray, 193. | ed. 2 Haw. c. 47. s. 1. Fost. 29 |
| | to 39. |

Where the offence turns out in evidence to be of an higher degree than is alleged in the indictment, it is in the discretion of the court to discharge the jury and to direct another indictment to be preferred. Thus, where the indictment charges the prisoner with murder, and the offence appears to be petit treason, it would not be advisable to direct the jury to acquit, least the defendant should avail himself of the acquittal in bar of a second indictment; and in such case the most prudent course would be to discharge the jury upon that indictment, and to direct a fresh one to be preferred (*e*). So if upon an indictment or action for a trespass the offence appear to be felony, no verdict ought to be taken unless the defendant has been acquitted of the felony (*f*).

The jury may either deliver a general verdict of conviction or acquittal upon the whole of the charge against one or more defendants; or, *secondly*, they may specially find the defendant guilty of part of the charge and acquit him of the remainder; and where several are indicted together, may find one or more guilty of the whole or part, and acquit the rest; or, *thirdly*, they may find the special facts upon which the charge is founded.

I. If they find the prisoner *generally, guilty*, judgment may be given against him, provided any one count in the indictment be sufficient to support the charge, though the rest of the indictment be faulty; for being guilty generally, he is severally guilty of each offence separately charged, and, therefore, is found guilty upon that charge which is sufficient to warrant the judgment (*g*).

(*e*) Fost. 327. 328. 104. supra, p. 38.

2 Roll. Ab. 556, 7. 1 Mod. 283.

(*f*) *R. v. Cross*, 12 Mod. 520, 634. 2 Haw. c. 47. s. 6.

(*g*) *Salk.* 384, 730. *Str.* 845. *Cowp.* 276.

Hence the case differs from that of a general verdict in a civil action, where general damages are given and where one of the counts is faulty; for since damages are given generally, some part must have been given in respect of the faulty counts, and the court cannot apportion the damages and say how much the plaintiff ought to receive upon the sufficient counts (*h*).

Secondly, the jury may find the defendant guilty of part of the charge and acquit him of the residue.

For, in the first place, every indictment is divisible in respect of its several counts, each of which professes to charge a distinct offence of which it contains a complete description; and, therefore, a defendant may be found guilty of the charge contained in any one count, and acquitted as to the remainder.

So in general where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified in the indictment or information, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue (*i*); as where he is charged with engrossing 1000 quarters of wheat, and the evidence amounts to but 700.

But if the defendant be charged with making a contract contrary to the purview of a statute, such contract must be proved as laid (*k*).

The same principle applies where the description of the offence laid in any count of an indictment, includes that of a more general and less aggravated offence; then, except in some special instances which will be noticed, the defendant may be found guilty of the more general and

(*h*) 1 T. R. 151. 3 T. R. 433.

(*k*) 2 Haw. c. 26. s. 75. Lane, 19. 59. 60.

(*i*) 2 Haw. c. 26. s. 75.

be acquitted of the more aggravated offence. Thus it has been holden, that upon an indictment for burglary the defendant may be found guilty of the larciny and acquitted of the burglarious entry (*l*); upon an indictment for stealing privately from the person, he may be found guilty of the larciny and be acquitted of the residue of the charge (*m*); upon an indictment under the statute of stabbing (*n*), he may be acquitted of the offence charged under the statute, and may be convicted of manslaughter at common law (*o*); upon an indictment for murder he may be found guilty of manslaughter (*p*); upon an indictment for petit treason he may be convicted of murder or any inferior species of homicide (*q*); upon an indictment for grand larciny he may be found guilty of petit larciny (*r*).

It is said to have been adjudged, that where the jury find a man not guilty upon an indictment or appeal of murder, they are not bound to make any inquiry whether he be guilty of manslaughter (*s*); yet, since a general acquittal upon an indictment of murder would bar a subsequent indictment of manslaughter, it seems to be the bounden duty of a jury to inquire of the manslaughter in the first instance; for otherwise the offence would go unpunished, and it is the constant practice, where the

(*l*) 1 Hale, 560. *R. v. Symmers*, Trin. 1706. *R. v. Francis*, Com. 478. *R. v. Withal and Overend*, Leach, 102. 2 Hale, 302.

(*m*) 2 Hale, 302.

(*n*) 1 J. 1. c. 8.

(*o*) Harwood's case, Style, 86. 2 Hale, 302.

(*p*) 1 Ins. 282. 2 Hale, 302.

(*q*) 2 Hale, 302. Radbourn's case, Leach, 512. 2 Haw. c. 47. s. 6.

(*r*) 2 Hale, 302.

(*s*) 2 Haw. c. 47. s. 4. Cro. Eliz. 276. 296. 464.

facts warrant it, for the court to charge them so to inquire.

Withal and Overend (*t*) were indicted for burglariously breaking and entering the dwelling-house of A. B. and stealing therein 60*l*. The verdict was, "not guilty of the breaking and entering of the dwelling-house in the night-time, but guilty of stealing the money in the dwelling-house." There was no separate count on the stat. 12 Ann, c. 7. for stealing in a dwelling-house to the amount of 40*s*. But a great majority of the judges were of opinion, that where a prisoner is indicted for a complicated offence, comprehending in itself divers circumstances of aggravation, each of which is ousted of clergy, though he be acquitted of some of those circumstances, yet if he be found guilty of others from which benefit of clergy is taken away, he shall receive sentence of death; and, finally, all the judges were of this opinion,

Exceptions.

In general, where the defendant upon his trial for the more aggravated offence would be debarred of any advantage which he might have claimed had he been tried for the more general offence, he ought not to be convicted of the latter, for he would thereby be excluded from those advantages to which he is by law entitled. And therefore, if the defendant be indicted for felony, and upon the evidence it appear that the fact amounts to no more than a bare trespass, he cannot be found guilty of the trespass,

If the jury find facts specially, whence the law infers malice, judgment of death must be given though they do not find specially that the act was malicious or the stroke	felonious. Mackally's case, 9 Co. 69. Holloway's case, Palm. 548. (<i>t</i>) Leach, 210. East. P.C. 547.
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but ought to be indicted anew (x). It has been said, that if the offence be laid as felony, and the defendant be found guilty generally, if the court be afterwards of opinion that the fact amounts not to felony, but only to an enormous trespass, judgment may be given upon it as for a trespass only (x); but this doctrine was overruled in West-beer's case, as being repugnant to the rules of law and the principles of justice (y).

But where a defendant is indicted for petit treason he may be found guilty of murder, for he loses no advantage by the change, but on the contrary, is placed in a better situation than if he had been indicted for murder. But for this very reason, if he be indicted for murder (z), and the offence turns out to be petit treason, though the latter be but aggravated murder, he ought not to be found guilty of the murder.

II. *General qualities and requisites of a verdict in case of a partial acquittal.*

It has been adjudged that the verdict, in case of a partial acquittal, should extend to the whole of the charge, so as to leave no part upon which the defendant has not been either convicted or acquitted. Hence, upon an indictment for murder, a verdict, finding the defendant guilty of manslaughter, but silent as to the residue of the charge, has been holden to be insufficient and void (a). But it is laid down generally, by many authorities, that upon an indictment for murder the prisoner may be convicted of manslaughter, without any intima-

(u) 2 Haw. c. 47. s. 6. Kel.
29, 30. R. v. Cross, 12 Mod. 520:

(x) 3 Haw. c. 47. s. 6. Kel.
29, 30. Cro. Car. 332. Cro. J.
497. And. 351. Dalt. 321.

(y) Leach, 15. Vide supra,
39.

(z) See p. 38. n. (x).

(a) And. 163. 2 Haw. c. 47.
s. 5.

tion that the charge of murder must be expressly negatived (b).

At all events, if there be any words from which it can be implied that the verdict extends to the whole charge, it will be sufficient. Therefore, where upon an information for forging and *publishing* a deed, the defendant was found guilty of the trespass and forgery *aforesaid*, the verdict was holden to be sufficient, though it expressed nothing as to the publishing, since the word *trespass* implied it.

And where several offences are charged in the indictment, and upon a general plea of not guilty the jury find the facts specially, and leave the question of guilt or innocence for the opinion of the court upon those facts, the verdict will be sufficient, though from those facts it appears that the defendant was guilty of one only of the offences charged. Thus, in Hayes's case (c), the indictment charged the defendant, 1st. with forging a bond; 2dly. with uttering the same, knowing, &c.; 3dly. with publishing a forged bond, (which was set out and was similar in its terms to the first) knowing, &c. The verdict found that the defendants did forge a bond, setting it out as in the first part of the indictment, and then specially found the publication of the same by the defendants, with a guilty knowledge; but whether, upon the whole matter, the defendants, or either of them, are or is guilty of the trespass, contempt, false forging, and misdemeanor *aforesaid*, in the indictment *aforesaid* specified, in manner and form as by the said indictment is supposed, the jury are ignorant and pray the advice of the court, and if the court &c, shall be of opinion, &c.; it was argued that the ver-

(b) 2 Hale, 302. 9 Co. 67. (c) *Ld. Ray.* 1518. *Str.* 843: 4 Co. 40. 46.

dict was incomplete, since three offences were charged, but that the facts applied to the two first only, and that as to the last, the jury ought to have found the defendants not guilty. The court held, that if a jury find but part of the matter put in issue, and say nothing as to the rest, the verdict is ill, and a *venire facias de novo* shall issue if no judgment be given, and if judgment has been given it shall be arrested. But that, in the principal case, as the "not guilty" went to the whole indictment, so the verdict was found as to all the offences charged in the indictment. The jury had found all the facts proved before them, and submitted it to the court whether they did maintain all the charges. They might doubt, though the proof was but of forging one bond and the publication of that bond, whether they could, upon their oaths, safely say, that he was not guilty of publishing a certain forged writing, &c. knowing it to be forged, it not being alleged that it was *another* forged writing different from the first. But the court held, that though the indictment in mentioning a certain forged writing, did not say a certain *other* forged writing, yet that it was not to be taken as the same with the one mentioned before; and, therefore, that the proof was not applicable to the last charge, and, upon the whole, declared that the special verdict had found the defendants guilty as to the two first offences, and not guilty as to the last.

Where the prisoner is found guilty of the less aggravated offence, and acquitted of the more serious part of the charge, the more correct mode is, to find the prisoner guilty of the offence which has been proved, but not guilty of the circumstance in which the aggravation consists; for a verdict finding the defendant not guilty of the higher offence generally, but guilty of the inferior and included offence, has been objected to as contradictory, since an acquittal of the former includes an acquittal of the lat-

ter. In Connor's (d) case, upon an indictment for burglary and stealing goods in the house, the verdict was "*guilty* of felony in stealing goods to the value of 150*l.* from the dwelling-house, and *not guilty* of the burglary." According to one report of this case, it was holden, that an acquittal of the burglary included an acquittal of the breaking and entering and taking of the goods; but that, if the entry of the verdict had been "*not guilty* of breaking and entering the house in the night-time, but *guilty* of the rest of the indictment, the prisoner would have been convicted of stealing goods to the value of 40*s.* in the dwelling-house, and been ousted of clergy by stat. 12 Ann. c. 7. But from another report of this case, coming from high authority (e), it appears that Ld. C. J. Lee, Parker, C. B. and the judges Reynolds, Abney, Burnet, Denison, and Clarke, thought that the prisoner was ousted on the finding of the jury. Willes, C. J. inclined that the indictment was ill, Wright, J. contra. But upon the doubt expressed by the minority, the prisoner was recommended for a pardon on condition of transportation. In a subsequent case the prisoner was indicted for a burglarious entry and stealing in the house; the verdict was, "*not guilty* of the burglary, but *guilty* of stealing to the amount of 40*s.* in the dwelling-house (f)." And the entry was made by the officer in those words. The judges, upon consideration, held this to be sufficient to warrant a capital judgment. They agreed that the minute was only for the future direction of the officer, and to shew that the jury found the prisoner guilty of the larciny only. But many of the judges said, that when it occurred to them they should

(d) Leach, 43. entitled Comer's case.

(f) Hungerford's case, Bristol, 1790. East. P. C. 518.

(e) East, P. C. 517. cites from a note of Mr. J. Abney's.

direct the verdict to be entered, "not guilty of the breaking and entering in the night, but guilty of the stealing," &c." as that was more distinct and correct. It appeared to be the constant practice, upon every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing.

It has already been seen, that though several may be jointly charged in respect of the same offence, yet that the law considers the crime of each as several, and that one or more may be convicted on the same indictment and the rest acquitted (g). And, therefore, if two be jointly indicted for murder, he who struck may be found guilty of manslaughter, he who maliciously abetted, of murder. So upon a joint indictment of petit treason, a wife or servant may be found guilty of petit treason, and a stranger of murder.

If the offence be in its nature such as to require the concurrence of more than one, the jury cannot acquit one or more, and find another guilty, where the guilt of that person, as alleged in the indictment, is inconsistent with the innocence of the rest. Thus if several be indicted for a riot or conspiracy, and the verdict acquit all but two in the former case, and all but one in the latter, it will be repugnant and void, unless the indictment allege the offence to have been committed in conjunction with other persons (h); for there can be no riot without three, or conspiracy without two.

So if an accessory, either before or after the fact, be indicted at the same time with his principal, if the latter

(g) Vide supra, 35. 2 Haw. Tr. 160. Popham, 202. Str. c. 47. s. 8. 193. 1227. 12 Mod. 262. Bur-

(h) 2 Haw. c. 47. s. 8. 4 St. row, 1262.

be acquitted, the accessory must also be acquitted as a matter of course, since his guilt is entirely inconsistent with the innocence of him who is charged as principal.

In the case of *Turner (h) and others*, who were jointly charged with a burglary, the jury found one guilty of the burglary and another of larciny only; but the two chief justices held, that the jury could not, upon the same indictment and the same evidence, find one guilty of the burglary and the other of larciny.

III. *Special verdict.*

It is perfectly clear, that the province of a jury is confined to facts, and though a general verdict, which they are in all cases entitled to return, necessarily includes matter of law as well as of fact, yet upon the matter of law, they are in conscience bound in a doubtful case to follow the advice and direction of the court. And a general verdict, though founded upon a mistake in law, can seldom prejudice the defendant; for, since the special facts are stated upon the indictment, the mistake of the jury, in supposing that those facts in point of law constitute the offence, is open to the subsequent correction of the court. But the criminality of the party frequently depends upon circumstances, which *do not appear upon the record*; and this happens where a general verdict involves the application of legal and technical terms to facts of a doubtful nature. Thus in case of larciny what amounts to a *felonious* taking, and in case of homicide what amounts to a *felonious* killing of *malice prepense*, is to be collected from circumstances extrinsic of the record, and these frequently so far from being mere conclusions of fact, constitute very difficult and important questions of law. There are two modes of remedy; either the jury find the defendant guilty, and a spe-

(h) 1 Sid. 171.

cial case is reserved for the opinion of all the judges, and afterwards a pardon is applied for, if that opinion be in favour of the prisoner; or, according to the more formal and technical mode, the jury find the facts by a special verdict, which is entered upon the record, upon which the judgment of the court is afterwards pronounced.

For it has long been settled, that a jury may give a special verdict in a criminal case, whether capital or not capital, as in a civil one (*i*). There is also one class of cases, in which a special verdict must necessarily be given: and this happens, where upon an indictment for murder or manslaughter, it appears to the jury, that the killing was by misadventure or in self-defence, for in such case it is not sufficient to find that the killing was by misadventure or in self-defence, but the special matter must be set forth (*k*); and then, if upon setting forth the facts, it appear to the court, that the killing amounted to murder or manslaughter, the court will give judgment accordingly, though the jury find in conclusion, that it was *per infortunium* or *se defendendo* (*l*).

The reason why a jury cannot acquit generally under such circumstances is, that though the facts do not amount to felony, yet they occasion a forfeiture of goods; and since the distinction between a killing by misadventure, or in self-defence and manslaughter, is, often very nice and critical, and involves a question of law, it is proper that the whole should be submitted to the judgment of the court (*m*).

But if one of non-sane memory kill another, or if a

(*i*) 2 Haw. c. 47. s. 3. 2 (*l*) 2 Hale, 302. 2 Haw.
Hale, 302. 9 Co. 12; 63. 1 c. 47. s. 4.
Buls. 87: (*m*) 2 Hale, 302.

(*k*) 2 Hale, 302.

person lawfully kill another who attempts to rob him, the defendant may be found not guilty generally, for in such cases there is neither felony nor forfeiture (*n*).

The special verdict or case ought to state facts and not merely the evidence of those facts (*o*). When a fact is alleged to have happened at some place within the county merely by way of venue, the jury may find the thing done in any other place or county, provided it be of a *transitory nature* (*p*).

So a special verdict will be good, notwithstanding any other *variance* immaterial to the essence of the offence; as if an indictment for homicide allege three wounds to have been inflicted by the defendant, and the special verdict find one only (*q*). But the jury cannot find that which is essential to the offence to have happened in another county (*r*). Neither can they vary either from the time or place laid, when it is material to the offence (*s*). It is sufficient, if the verdict substantially find such facts as amount in law to the offence charged, though the precise and technical words of the indictment are not made use of. The indictment charged the defendant with *forging and counterfeiting* a bank note, the verdict found that he *erased and altered* a bank note by changing the word two into five, and was holden to be sufficient (*t*).

(*n*) 2 Hale, 303. See 24 H. 8. c. 5. Cro. Car. 544. Lord Hale excepts the case, where the coroner's inquest finds it murder or manslaughter; for there it is apparent, that a man has been slain, and the jury, if they acquit the prisoner, must inquire who did it; and to find the prisoner not

guilty, and yet find that he killed the deceased, would involve a contradiction.

(*o*) 2 Wils. 263.

(*p*) 6 Co. 47. 2 Roll. 689.

(*q*) Buls. 87. 2 Haw. c. 47. s. 4.

(*r*) 6 Co. 47.

(*s*) See Com. Dig. Pleader, s. 15.

(*t*) *R. v. Dawson*, Str. 19.

If the verdict do not sufficiently ascertain the facts of the case, the court may award a *venire facias de novo* (u); and it has been said, that a special verdict in a capital case cannot be amended (x). But Lord Mansfield held, that a special verdict might be amended, if there were minutes to amend it by (y), and this was done in Gibson's case (z). It is necessary that the verdict should expressly find the material facts to have been done in the county in which the indictment is laid, for otherwise the court cannot give judgment (a).

In deciding upon a special verdict, the attention of the court is confined to the facts expressly found, and a defect cannot be supplied by intendment (b). And, therefore, where the special verdict found that the prisoner discharged a gun, and thereby killed J. S. and did not find that he discharged the gun *against* J. S. as alleged in the indictment, the court held that they could not imply that circumstance from the facts of the case (c).

So where the defendants were indicted for a robbery from the person, and the special verdict stated facts which, in point of law, amounted to a larciny, but not to a larciny from the person, and referred it to the court whether the prisoners were guilty of the felony and robbery charged against them in the indictment, the judges thought that judgment of larciny could not be given upon that

(u) Skinn. 667. Ld. Ray. 1521.

(x) Per Lord Holt, Ld. Ray. 141.

(y) *Hazell's case*, Leach, 425. Buller, J. contra. So if the defendant occasion the defect. Str. 844.

(z) See Dong. 375.

(a) *Hazell's case*, Leach, 406. but there were other objections in this case, and the decision of the court was not made known.

(b) 2 Haw. c. 47. s. 9.

(c) 2 Haw. c. 47. s. 9. Kel. 72. 111. 4 Burr. 2073. Str. 1015. Cowp. 830.

finding (d). So where upon an information under the statute of usury, the jury found that as to the corrupt agreement in the said information specified, the defendant was guilty, and that he took profits, &c. to the value of 60l.; the verdict was holden to be imperfect, for the court could not take the lending of the money by intendment (e).

In the case of libel, it was for many years a disputed point, whether the jury had any other duty to perform than to find the fact of publication and the truth of the *innuendos*; for it was said, that since the libel itself appeared upon the record, its intrinsic illegality and the intention of the publisher were matters of law to be decided by the court, upon consideration of the record itself. Woodfall (f) was indicted for publishing a seditious libel called *Junius*, the verdict was, "guilty of publishing only." It was contended that no judgment against the defendant could be founded upon this verdict, since the jury had not found *malice*. Lord Mansfield, in delivering the judgment of the court, intimated that where the act is in itself unlawful, the proof of justification lies upon the defendant, and in failure thereof the law implies a criminal intent. But, that since a doubt had arisen from the introduction of the unusual and ambiguous word *only* into the verdict, there should be a *venire de novo*. Shipley (g), dean of St. Asaph, was tried upon a similar indict-

(d) *R. v. Francis and others*, Rep. Temp. Hardwicke, 115. East P. C. 784. tam. qu. In case of burglary, the jury must find the locus in quo to be parcel of the manor house, or that it is inclosed within the same fence, &c. *Garland's case*,

East's P. C. 493. and see *R. v. Francis*. 2 Str. 1015. Com. Pr. 478. as to intendment in case of robbery.

(e) Cro. J. 210.

(f) Burr. 2661.

(g) 3 T. R. 430.

ment. The jury brought in their verdict guilty of publishing *only*, but upon being informed that by such a verdict they would negative the truth of the innuendos, and that if they left out the word *only*, the question of law would be open upon the record, the jury found him "guilty of publishing, but whether a libel or not we do not find." And upon a motion for a new trial, the court of King's Bench, in conformity with many previous decisions (*h*), discharged the rule.

But by the stat. 32 G. 3. c. 60. it is *declared* and enacted, that on every trial of an indictment or information for the making or publishing of any libel, it shall be competent to the jury to give a general verdict of guilty or not guilty upon the whole matter put in issue, and that the jury shall not be required or directed by the court to find the defendant guilty merely on proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to it in such indictment or information.

But where a jury find a matter committed to their charge, and afterwards conclude against law, the verdict will be good, and the conclusion may be rejected (*i*); as where, upon a charge of murder, the jury specially find the facts, and conclude that it was done *se defendendo* or *per infortunium*; if, upon the whole, it appear to be murder or manslaughter, the court will give judgment accordingly, notwithstanding such conclusion (*k*).

In case of an indictment for murder, it is not necessary that the special verdict should find *malice*, for malice is

(*h*) See 3 T. R. 430. in the notes, and Starkie's Law of Libel, 623. 5 Burr. 2661, 2686.

(*i*) 4 Co. 42.

(*k*) 2 Hale, 302.

always a conclusion of law from the facts (*l*); neither is it necessary to find that the stroke was felonious (*m*).

It was formerly not unfrequent, when the jury returned a verdict of acquittal manifestly against the evidence, for the court to direct them to reconsider their verdict before it was recorded; but this in modern times has seldom been practised (*n*).

If the jurors, by mistake or partiality, deliver an improper verdict in court, they may rectify it before it is recorded; or, by the advice of the court, may reconsider and alter it (*o*). But after the verdict has been recorded it cannot be altered in substance (*p*), though it seems that it is afterwards amendable in matters of form. A verdict of *acquittal* upon an indictment or information cannot be set aside and a new trial awarded (*q*).

But in case of a conviction, it is in the discretion of the court to grant a new trial where the verdict is against the evidence, or the directions of the judge, or in any case where it appears to be necessary for the purposes of justice (*r*). Where the facts are found so defectively that no judgment can be given, the court may award a *venire facias de novo*; but if the verdict has been entered contrary to the minutes taken at the trial, it may be amended by them (*s*).

(*l*) Str. 773. 12 Rep. 87.
Palm. 545. Ld. Ray. 1485.

(*m*) *Mackalley's case*, 9 Co.
69. *Holloway's case*, Palm.
545.

(*n*) 2 Haw. c. 47. s. 11.
And. 104. Crompt. 114. Al.
12. 2 St. Tr. 260.

(*o*) 2 Hale, 299. Plow. Com.
211.

(*p*) 2 Hale, 300. 1 Ins. 227.
20 Ass. 12. 5 H. 7. 22.

(*q*) 2 Haw. c. 47. s. 12.

(*r*) 2 Haw. c. 47. s. 12. See
p. 341.

(*s*) *Hazell's case*, Leach, 406.
Cro. Eliz: 112, 150. 1 Sal.
47, 53.

Of the finding of facts dehors the record.

If a man be arraigned upon an inquest of murder or manslaughter returned by the coroner, and he be found not guilty, the jury who tried him ought further to inquire who committed the fact, and if they find that A. B. did it, he may be put upon his trial in chief upon that finding (t). And the practice was anciently the same with respect to indictments found by the grand inquest (u). But the usage had entirely ceased as to indictments, in the time of Lord Hale, and with respect to inquests had become mere matter of form (x).

And as to indictments of robbery, it was formerly the practice to oblige the jury under the statute of Winchester, in case they acquitted the prisoner, to present who did it, for the hundred was answerable, and the trials before the justices in eyre were for the most part by a petit jury of the same hundred; but afterwards, when the jury who tried and inquired came from the body of the county, the practice ceased (y).

The jurors of the petit inquest are charged to inquire if the party fled, and of his goods and chattels; this, however is but an inquest of office and traversable (z); but it has been said that a presentment of flight before the coroner, is conclusive (a).

It seems to be a general rule, that if a verdict contain such a finding as will warrant a judgment against the defendant, any superfluous and unnecessary addition may be rejected as surplusage (b).

(t) 2 Hale, 300.

(z) 1 Hale, 362.

(u) b.

(a) 1 Hale, 362. 2 Hale,

(x) 2 Hale, 301.

301.

(y) 3 E. 3. Coron. 307.

(b) 2 Haw. c. 47. s. 10.

Staundf. P. C. 181. 2 Hale, 301.

CHAP. XXI.

Of Judgment.

THE prisoner cannot be convicted of treason or felony unless he be present in court, but he may be found guilty of a misdemeanor in his absence; and, if he do not surrender himself to await the sentence of the law, a *capias* is awarded and issued to bring him before the court to receive his judgment; but if he be present at the trial, it is in course that he should be committed, unless the prosecutor consent to his being liberated upon his recognizance to appear when called upon to receive the sentence of the court (a). So if he be taken on a *capias pro fine*.

In case of felony there can be no *new trial* (b), but after a conviction of an inferior offence (c), the Court of King's Bench will, in its discretion, grant a new trial, whenever it is manifestly conducive to the ends of justice. In strictness the defendant should apply within the limits allowed in civil cases (d); but for the attainment of substantial justice, the court will interpose after the regular time has elapsed (e); and where some defendants have

(a) Barr. 2539. *R. v. Waddington*, 1 East, 159.; but the length of his previous imprisonment is taken into consideration by the court in their judgment.

(b) 6 T. R. 638.

(c) *Ib.* Doug. 797.

(d) 5 T. R. 436.

(e) *R. v. Glough*, Doug. 171.

797, 5 T. R. 436. 1 East, 146. 2 Str. 845. In *R. v. Parker and Brown*, Leach, 984. 3d ed. it was said, that in a criminal proceeding it was never too late to review the circumstances. See also the observation of Buller, J. *R. v. Tilley*, Leach, 770. 3d. ed.

been acquitted and others convicted, the court will, in its discretion, grant a new trial as to the latter, but they must all be present in court, when the motion is made (f).

By the practice of the court of King's Bench upon a conviction of any crime, whether capital or otherwise, the defendant is allowed four days to move in arrest of judgment (g), if there be so many remaining of the term, and if not, then the longest time that can be had (h).

In case of misdemeanors, if there be not four days remaining of the term, it seems that the court will not give judgment until the ensuing term (i). The defendant may move in arrest at any time before judgment has actually been given (k).

Upon a conviction at the assizes or quarter sessions, it is not unusual to pass sentence immediately, and in all cases of murder, in whatever court the conviction may be, it is expressly enacted by the stat. 25 G. 2. c. 37. that sentence shall be passed *immediately*.

If a man be indicted of felony before justices of the peace, oyer and terminer, or gaol delivery, and after conviction the record be removed by *certiorari* into the King's Bench, and the prisoner be also removed thither by *habeas corpus*, he may plead that he is not the same per-

(f) *R. v. Mawbey et al.* 5 T. R. 619. *R. v. Teale et al.* 11 East, 307. See also Str. 843, 968, 1227. 2 Bur. 930. Com. Dig. Ind. N. *R. v. Askew and others*, 3 M. & S. 9. *R. v. Cochrane*, ib.

(g) 2 Haw. c. 48. s. 1. 3 St. Tr. 794. *Algernon Sidney's case*, 3 St. Tr. 999. *Boswell's case*, 4 St. Tr. 777.

(h) 2 Haw. c. 48. s. 1. 4 St. Tr. 217.

(i) 7 St. Tr. 63; but see 4 St. Tr. 217. and 2 Haw. c. 48. s. 1. In one instance of an aggravated misdemeanor, Lord Hale is said to have refused to listen to a motion in arrest of judgment. *Saund*, 301, 2.

(k) 5 T. R. 445.

son, and allege a diversity of name, and if the king's attorney confess this, he shall be discharged out of custody (*l*). But the king's attorney may take issue upon it, and aver that he is the same person, and known by one name as well as the other (*m*). But if, upon being called upon to say why judgment should not be given against him, he stand mute, it is necessary to inquire whether he be the same person, for he is not concluded by the return if he has not continued in custody of the same court since his arraignment (*n*). And this is also necessary where a party is outlawed, and is brought into the King's Bench by *capias utlagatum* (*o*). But if he has been in the custody of the King's Bench from the time of his arraignment, or has been bailed by the court, and has been rendered by his bail, no such inquiry is necessary on his standing mute (*p*).

It seems to be a general rule, that no fault, which would have been fatal on demurrer, can be cured by the verdict; and, consequently, that any such fault may be taken advantage of by motion in arrest of judgment, or by writ of error if it be granted.

Of the different kinds of judgment.

The judgment in high treason, except in respect of the coin, is, that the offender be drawn upon a hurdle to the place of execution, there to be hanged by the neck, to be cut down whilst he is alive, and his entrails to be taken out and burnt before his face, and his head cut off and his body quartered, and his head and quarters to be at the king's disposal (*q*).

(*l*) *John Apace's case*, 2 Hale, 402.

(*m*) *Brown's case*, Lib. pl. Cor. 31. 2 Hale, 402.

(*n*) 10 E. 4. 19.

(*o*) 2 Hale, 402.

(*p*) 2 Hale, 402. 10 E. 4. 19.

(*q*) *East. P. C.* 137. 2 Hale, 397. 1 Hale, 187.

But the drawing upon a hurdle is not entered upon the record (*r*); neither is the cutting off the privy member, which is not usually pronounced (*s*). By the stat. 54 G. 3. c. 146. the judgment in all cases of high treason, where the former judgment was to be pronounced is, "that the offender be drawn on a hurdle to the place of execution and be there hanged by the neck until he be dead, and that afterwards the head be severed from his body and the body be divided into four quarters to be disposed of as his Majesty shall think fit."

The judgment against a woman, whether for high or petit treason, was, that she should be burnt; but by the st. 30 G. 2. c. 48. s. 1. she shall be drawn and hanged. Also by the second section of that statute, women convicted as principals or as accessories before the fact in petit treason, shall be dealt with according to the provisions of the stat. 25 G. 2. c. 37. in case of murder.

In all cases of *treason relating to the coin*, and of *petit treason*, the judgment is, to be drawn and hanged, which was the judgment previous to the stat. 25 E. 3. st. 5. s. 2. (*t*).

And though it has been holden that one guilty of a new created treason was liable to the severer sentence, yet the contrary seems to be settled, both because the other was the common law judgment, and also because it was to be presumed that the legislature, in creating a new treason relating to the coin, intended to constitute it with inci-

(*r*) 2 Hale, 397. 2 Haw. c. Tr. 16. and see Fost. 336. 4
48. s. 3. Bl. Comm. 92. Walcott's case,

(*s*) East, P. C. 137. 2 Hale, 4 Mod. 395.

397. 2 Haw. c. 48. s. 3. 6 St. (*t*) 2 Hale, 397.

dents similar to those belonging to other treasons concerning the coin (*u*).

The judgment for *felony*, whether against a man or woman, has been the same since the reign of Henry the first; to be hanged by the neck till he or she be dead: it is thus laconically entered upon the roll: "*Sus. per coll.*"

By the stat. 25 G. 2. c. 37. which was made for the purpose of adding a further terror and peculiar mark of infamy to the punishment for murder, it is directed that, "sentence shall be pronounced in open court immediately after the conviction of such murderer, and before the court proceed to any other business, unless the court see cause for postponing the same, in which sentence shall be expressed not only the usual judgment of death, but also the time for the execution thereof, and the marks of infamy hereby directed."

By the 1st. section, the execution shall be on the day next but one after sentence passed, unless it happen to be Sunday, and in that case on the Monday following.

By the 2nd section, "if the execution be in Middlesex or in the city of London, or within the liberties thereof, the body of the murderer shall be taken by the sheriff, &c. to the hall of the surgeons' company, or to such place as the company shall appoint, who shall give to the sheriff a receipt for the same, and the body so delivered shall be anatomized by the surgeons or by such persons as they shall appoint. If the execution take place at the assizes, the body to be delivered to such surgeon as the judge shall direct."

By sec. 4. the judge has power to stay the execution at his discretion, regard being had to the intent of the act.

(*u*) 2 Haw. c 48. s. 4. 2 Hale, 397.

By sec. 5. the judge may direct the body to be hung in chains.

The usual form of the sentence under this act is, "that you be taken from hence to the place from whence you came, and that you be taken from thence; on ——— next, to the place of execution, and that you be there hanged by the neck till your body be dead, and that your body, when dead, be taken down and be dissected and anatomized (x)"

Upon this act it has been holden that the judgment for dissection and anatomizing only, should be included in the sentence, and that, if it should be thought advisable, the judge might afterwards direct the body to be hung in chains by special order to the sheriff (y). That the statute extends to peers convicted before the lords in parliament (z). And that it applies to cases where the offence, from the relation of the parties, amounts to petit treason.

The judgment in case of *præmunire* is, that the defendant shall be out of the king's protection, and that his lands and tenements, goods and chattels, shall be forfeited to the king, and that his body shall remain in prison during the king's pleasure (a).

The judgment in case of *misprison of treason* is, that the offender shall be imprisoned during his life, forfeit all his goods and the profits of his lands during his life (b).

Judgment in petit larciny, at common law, is to be whipt and imprisoned for a limited time (c); but by virtue

(x) See East, P. C. 373. and the case of Swan and Jefferies, Fost. 107.

(y) Fost. 107.

(z) Earl Ferrers's case, Fost. 139. 10 St. Tr. 478.

(a) 2 Haw. c. 48. s. 9.

(b) 1 Hale, 374. 2 Hale, 400. 3 Ins. 36. 2 Haw. c. 48. s. 10.

(c) 2 Hale, 400.

of several statutes, the offender may be imprisoned or transported for a term not exceeding seven years (*d*).

For crimes below the degree of felony, and for which no specific punishment is appointed by any statute, the judgment rests for the most part upon the discretion of the court. For crimes of an infamous nature, such as perjury, forgery, at common law, cheats, conspiracies, not requiring *villenous judgment* (*e*) and other such like, it is left to the wisdom of the court to inflict such corporal punishment and fine as shall seem proportionate to the offence (*f*).

But the court cannot inflict any new mode or species of punishment before unknown to our laws, unless specially authorised by the legislature (*g*). And the court may assess a fine, but cannot award corporal punishment against an offender in his absence (*h*). Where several are jointly indicted, an award of a joint fine against them would be erroneous; for if the fines were not to be severally awarded, but one joint fine imposed upon all, one who had paid his proportionate share might be detained in prison for default of the rest, which would be in effect to punish him for the offence of another (*i*).

Upon a conviction for a *nuisance*, the judgment is to be adapted to the nature of the offence alleged, if there be no allegation of the continuance up to the time of taking the inquisition, judgment that it be abated is unnecessary (*k*); but if a continuance be alleged, *prostration*

(*d*) 5 Ann. c. 6. 4 G. 1. c. 11.
6 G. 1. c. 23.

(*e*) This severe judgment lies upon a conspiracy to indict an innocent man of felony, but seems now by long disuse to have become obsolete. See 4 Bl. Comm. 136.

(*f*) See 2 Haw. c. 48. s. 14.

(*g*) 1 Ins. 135. 2 Ins. 470.
201. 2 Haw. c. 48. s. 16.

(*h*) Salk. 56. 400. Skin. 684.

(*i*) 2 Haw. c. 48. s. 18. 11 Co. 43. 1 Lev. 126.

(*k*) *R. v. Stead*, 1 T. R. 142.
7 T. R. 467.

should be awarded (*l*), but the Court of King's Bench will not give such judgment, if they be satisfied that the nuisance has been already effectually abated (*m*).

During the term, assizes, or session, in which judgment is given, it remains in the breast of the court, and the fine imposed, or any other discretionary punishment may be varied; but after the term it becomes matter of record, and admits of no alteration (*n*).

(*l*) *R. v. Pappineau*, Str.
686. 7 T. R. 468. 8 T. R.
148.

(*m*) *R. v. Incledon*, 13 East,
164.

(*n*) 1 Ins. 260. Cro. Car.
251. 2 Haw. c. 48. s. 20.

CHAP. XXII.

*Of avoiding the Judgment—Writ of Error, &c.*I. *By plea, p. 367.*II. *By Writ of Error, p. 371.*

A judgment may be reversed either by plea or by writ of error.

The plea is founded either on some defect apparent on the record, or upon some fact extrinsic of the record.

1. *By plea founded on a defect apparent on the record.*

A judgment of outlawry for treason or felony is, as has been seen, equivalent to a conviction of the offence, in other cases to a conviction of the contempt only, in not appearing.

In civil cases it seems that the defendant may, in the same term in which the exigent is returnable, reverse the outlawry upon plea or motion, by shewing any error in the process or indictment; but in criminal cases it appears, that the court of King's Bench will not reverse an outlawry for an intrinsic error, except upon writ of error (*a*). And such appears to have been the inclination of the court in the case of the *King v. Davis* (*b*).

(*a*) See 2 Haw. c. 50. s. 1. and the authorities there cited.
1 Ins. 259.

(*b*) Burr. 638.

But a conviction of felony, whereon the defendant has had his clergy, may, it has been holden, be discharged by exception to the indictment, since no writ of error lies upon the conviction, but only upon a judgment (c).

2dly. *By a plea founded on matter of fact extrinsic of the record.*

Upon all outlawries, except of treason or felony, the defendant may appear by his attorney, in order to reverse the outlawry according to the provisions of the stat. 4 & 5 W. & M. c. 18. s. 3.; but to reverse an outlawry of treason or felony the defendant must appear in person, and so he must upon an outlawry after conviction for a misdemeanor (d).

The defendant may plead, in avoiding the outlawry, that his name, or his addition, or his estate, degree, or mystery, is improperly described (e).

But upon a plea that his addition is mis-described, it seems to have been doubted whether he ought not to be put to his writ of error, since he allows that he is the same person (f). So he may plead that there is no such town as that whereof he is named (g).

That at the time of the writ purchased, and ever since, he has resided at a place different from that named in the writ (h); but in such case it seems that the outlawry shall be avoided against the person pleading only, and shall stand in force against the person of the same name and addition in the record (i).

(c) Cro. Eliz. 489. See 11 Co. 39.

(d) *R. v. Wilkes*, 4 Burr.

(e) 2 Haw. c. 50. s. 10.

(f) Fitz. Utlag. 37. 38 H. 6. 1. B. Utlag. 32. 51.

(g) Fitz. Utlag. 25. 26. 22 E. 4. 37. 2 Haw. c. 50. s. 10.

(h) 2 Haw. c. 50. s. 10. But see F. Ut. 5.

(i) 2 Haw. c. 50. s. 10. But see F. Ut. 25.

If there be two persons of the same name and addition with those mentioned in the indictment and process of outlawry, and one be taken on a *capias utlagatum*, or appear in order to avoid it, he cannot do it by an averment that there are two persons of that name and addition, and that the person intended is the elder and that he himself is the younger, but must resort to his writ *de idemptitate nominis* (*k*), which lies when a man is taken or molested by process against another of the same name (*l*). And this has been said, by some, to be the only remedy in such case after outlawry returned (*m*); but Lord Hale expressly holds, that if a person taken on a *capias utlagatum* deny that he is the person, if the king's attorney take issue upon it it shall be tried, but that if the prisoner say nothing it shall be tried by an inquest of office (*n*).

But a person cannot come in before outlawry pronounced, and plead that he is not the person, but must resort to his writ *de idemptitate nominis*. In civil proceedings it is usual, in such a case, to enter a more full description of the person intended, upon a new *exigent*, in order to shew the diversity; but in criminal process this cannot be done without a writ, since the description is of the finding of the jurors, and, therefore, cannot be altered without a further finding by a jury (*o*).

If the party be correctly described, no outlawry can be reversed upon a plea of fact, unless in case of treason or felony (*p*).

But in favour of life, an outlawry of treason or felony may be avoided, upon a suggestion or plea of any fact

(*k*) 2 Haw. c. 50. s. 10.

(*o*) F. Idemp. Nom. 3. F.

(*l*) F. N. B. 268.

N. B. 268. B. Idemp. Nom.

(*m*) 2 Haw. c. 50. s. 10. cites F. Ut. 6.

2. 11. 9 H. 4. 3.

(*p*) 2 Haw. c. 50. s. 6.

(*n*) 2 Hale, 402.

which shews it to have been erroneous (*q*); as, that the defendant was in prison (*r*), or in the king's service, or beyond the sea, at the time the outlawry was pronounced (*s*). In cases of *treason*, an outlawry pronounced against a person out of the realm, is, by stat. 26 H. 8. c. 13. as valid as if he had been resident within the realm; but, by the stat. 5 & 6 E. 6. c. 11. if the party so outlawed yield himself within one year, next after the outlawry pronounced, to the chief justice of England, and offer to traverse the indictment or appeal, he shall be received so to do; and, upon being found not guilty, by the verdict of 12 men, shall be clearly acquitted and discharged of the outlawry. These statutes extend to treasons created by subsequent statutes (*t*).

Where the judgment has been given by persons without authority, it may be falsified upon plea, for it is utterly void; as where a commission authorizes a proceeding upon an indictment by twelve, and it is taken by eight only (*u*).

Where a person has bought land of another, who is afterwards found guilty of felony generally, he may falsify the record as to the *time* of committing the offence, because the time is not material upon evidence (*x*); but if the vendor be attainted upon confession or abjuration, or by outlawry upon an indictment, the purchaser may, it is said, falsify the attainder in point of the offence itself (*y*).

(*q*) 2 Haw. c. 50. s. 6. 1 Ins.
269. 10 H. 4. 7.

(*r*) F. Utl. 2. 2 Haw. c. 50.
s. 6.

(*s*) Burr. 640.

(*t*) 3 Ins. 32. 2 Haw. c. 50.
s. 9. Fost. 46. Burr. 630.

Armstrong's case, 3 Mod. 47.

3 St. Tr. 895.

(*u*) 3 Ins. 231. Summ. 270.

(*x*) 1 Hale, 361. 2 Haw.

c. 50. s. 2. 3 Ins. 231. Syer's
case, Bl. Comm. p. 391.

(*y*) 1 Hale, 361. 49 E. 3. 11.

7 E. 4. 1. 3 Ins. 231. 2 Haw.
c. 50. s. 2.

By writ of error.

A writ of error to reverse a judgment lies from all inferior jurisdictions to the Court of King's Bench, from the King's Bench to the House of Lords; it also may be brought in the King's Bench to reverse an attainder before the lord high steward (z).

In cases of treason and felony, this writ ought to be granted wherever there is probable error; but it cannot issue without the fiat of the attorney-general, or an express warrant from the king (a), which is not a mere matter of course. But where the offence is of an inferior nature, and there is probable cause, this writ is grantable of right and not merely *ex gratiâ* (b).

This writ may be brought as well by the executor as by the heir of the party, to reverse an attainder of treason or felony, but not by any other person (c).

The most usual way of bringing a writ of error upon an indictment at the sessions or assizes is, to remove the record by *certiorari* into the Crown Office, and then to bring a writ of error *coram nobis*; but the indictment may be removed by writ of error in the first instance (d). But a *certiorari* is not proper after conviction and before judgment; because the justices, who tried the cause, are best able to apportion the fine (e).

Upon a writ of error brought, the court is to serve a rule in the office to assign error, and upon failure, to move for

(z) 1 Sid. 208. 4 Bl. Comm. Aylesbury case, 3d Ann. and see 4 Burr. 2550.
391. 2 Haw. c. 50. s. 17.

(a) 4 Burr. 2550. 2 Haw. (c) 5 Co. 111. Cro. Eliz.
c. 50. s. 13. 1 Sid. 69. 1 Buls. 225. 273. 558. Salk. 60, 61.
71. Harg. Co. Lit. 13. n. 1. 2

(b) According to the opinion Haw. c. 50. s. 11.

of ten of the judges in the (d) 6 Mod. 178.

(e) 1 Salk. 149.

peremptory rule, and upon default to nonsuit the plaintiff in error, and to award execution (*h*).

Where a defendant in a civil action brings a writ of error to remove a record, and neglects to remove the record, the court, where it remains, may award execution; but it is otherwise of *certiorari* to justices of the peace, for this operates as a *supersedeas* of execution after its return on account of the express words, "*cò quod rex non vult feloniam illam terminari alibi quam coram seipso* (*i*)."

The nature of the objections upon which this writ may be founded, have already been considered in treating of the several kinds of defects in the indictment, caption, and process, none of which, it seems, are cured by verdict.

It is to be regretted, that the courts, in listening to trivial errors, have so frequently sacrificed the great ends of justice to a mistaken and misplaced humanity, precarious in its application, since it extends without distinction to all degrees of guilt, and mischievous in its consequences (*k*).

In case of outlawries, indeed, trivial objections have been listened to with greater reason, for they enable the party to enter into the merits of his case.

As no writ can be allowed without the fiat of the attorney-general or warrant from the king, granted upon probable cause shewn, it follows, that the applicant, before he can obtain the writ, must assign his errors (*l*).

If the party attained of felony had lands, the attainder cannot be reversed without a *scire facias* against all the terre-tenants mediate or immediate (*m*), except in the case of treason (*n*), or in case of felony, where it is suggested

(*h*) 6 Mod. 178. 1 Vent. 53.

(*m*) 2 Haw. c. 50. s. 12.

(*i*) Dy. 245.

(*n*) In Stafford's case, M.

(*k*) See Lord Hale's observations, *supra*, p. 227.

12 Ann. a *sci. fa.* in case of treason was holden to be unnecessary, upon examination of all the precedents.

(*l*) 2 Haw. c. 50. s. 12. 1 H. 7. 13. B. Error, 351.

upon the roll, that the party had no lands, and the attorney-general confesses it (*o*).

Upon the reversal of the attainder of the principal, that of the accessory is *ipso facto* reversed (*p*).

The stat. 33 H. 8. c. 29. which enacts, that attainders of high treason, by force of the common or statute law, shall have the same effect with a parliamentary attainder, applies to lawful attainders only, and not to those which are erroneous or void, such, therefore, may be avoided as before.

After the reversal of an outlawry of treason or felony, the defendant must plead to the indictment as if he had come in upon the *capias* (*q*), or, if the outlawry be subsequent to conviction, he shall receive the sentence of the law. But when the judgment pronounced upon conviction is reversed or falsified, all the previous proceedings are absolutely set aside, and the party is remitted to the situation he was in before the charge was made as to both credit and estate (*r*). But he is still liable to a second prosecution for the same offence, for his life was never in jeopardy by the first (*s*). If the lands of the person attainted have been granted away, he may, upon the reversal of the attainder, resume his possession, without either suing a petition to the king, or a *scire facias* against the grantee (*r*).

(*o*) Salk. 495, 3 Keb. 29.

(*r*) 2 Haw. c. 50. s. 19. 2

(*p*) 2 Haw. c. 29. s. 40.

Bl. Comm. 393.

(*q*) 2 Haw. c. 50. s. 18. 3

(*r*) 2 Haw. c. 50. s. 20. And

Mod. 42. Burr.

188.

END OF VOL. I.

ERRATA.

- Page 17, line 9, for "law" read *land*.
185, — 5, read *the object of the conspiracy was to be effected*.
162, — 6, for "23rd" read 43rd.
167, — 17, for "10" read 16.
169, note (p), read *Lord Sanchar's case, 9 Co. 114*.
173, line 6, read *shillings, at the rate of 30 of such counterfeit pieces*.
175, — 2, dele "indeed"
182, — 6, for "manner" read *names*.
196, last line, for "chattels" read *chattel*.
223, line 1, for "XII" read *XIII*.
234, — 6, read *upon view of the body was taken before J. S. without, &c.*
294, — 14, for "issue" read *inquest*.
296, — 7, dele "as"
317, last line but 6, for "pleaded" read *pleads*.
336, last line of text, for "of" read *in*.
362, line 13, for "2" read 3.
438, — 9, read *dwelling-house*.
440, — 10 of note (h), dele "which," read *whether such house, barn, granary, &c.*
440, — 13 of same note, read *in the possession of any other person or persons, or in the possession*.
467, — 10, for "87" read 92.
470, — 18, for "mettle" read *metal*.
550, number of precedent, for "161" read 163.
606, — 11, for "189" read 195.
670, last line but 7, for "7" read 9.

✓

A
TREATISE
ON
CRIMINAL PLEADING,
WITH
PRECEDENTS OF INDICTMENTS,
SPECIAL PLEAS, &c.
ADAPTED TO PRACTICE.

VOL. II.

SECOND EDITION, WITH ADDITIONS.

—
BY THOMAS STARKIE, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

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TABLE OF CONTENTS.

TO

VOL. II.

APPENDIX OF PRECEDENTS.

	Page.
<i>Common Commencements, Conclusions, &c. of Indictments, &c.</i>	375
<i>Treason</i>	382
<i>Offences against the Person,</i>	
<i>Homicide</i>	387
<i>Assaults, with different Intent</i>	406
<i>Rape</i>	431
<i>Polygamy</i>	434
<i>Offences against the Habitation,</i>	
<i>Burglary</i>	436
<i>Arson</i>	439
<i>Forcible Entry</i>	445
<i>Larciny and Robbery,</i>	
<i>Larciny</i>	448
<i>By particular Persons, Servants, Clerks, &c.</i>	451
<i>Of particular Property</i>	456
<i>From particular Places</i>	467
<i>Accessories</i>	480
<i>Receivers</i>	483
<i>Frauds,</i>	
<i>Cheats</i>	488
<i>False Tokens</i>	494

	Page.
<i>False Pretences</i>	496, 752
<i>Gaming</i>	500
<i>Forgery</i>	503
<i>Personation</i>	529
<i>Perjury</i>	533, 757
<i>Frauds relating to the Coin</i>	555
<i>Bankruptcy</i>	568
<i>Malicious Mischief</i>	576
<i>Offences relating to Office</i>	593
<i>Misdemeanor in Office</i>	595
<i>Refusal to take an Office</i>	619
<i>Escape</i>	627
<i>Rescues, &c.</i>	642
<i>Transportation</i>	645
<i>Illegal Attempts, Solicitations, and Endeavours,</i>	
<i>Seducing a Soldier</i>	651, 749
<i>Artificer to leave the Kingdom</i>	651
<i>Seditious Words</i>	652
<i>Libels</i>	653
<i>Illegal Attempts</i>	663
<i>Illegal Solicitations</i>	666
<i>Offences against the public Peace</i>	667, 790
<i>Riots</i>	ib.
<i>Offences relating to Trade and the Price of Provi-</i>	
<i>sions</i>	678, 737, 743
<i>Offences against public Health and Convenience</i>	682
<i>Nuisance</i>	684, 735, 741
<i>Offences relating to the Administration of Justice</i>	702
<i>Compounding a Penalty</i>	707
<i>Conspiracies</i>	707, 742
<i>Usury</i>	736
<i>Pleas</i>	784
<i>Appendix Notes</i>	817
<i>Index to the Practice</i>	823
<i>Index to the Precedents</i>	780

APPENDIX

TO

CRIMINAL PLEADING, &c.

PRECEDENTS.

Common Commencements, Conclusions, &c. of Indictments, &c.

1. *Commencement of an indictment taken at the assizes or general quarter sessions.*

Lancashire (a), to wit. The jurors for our lord the king upon their oath present*, that A. B. (b), late of C. (c), in the county of L. labourer (d), on (e) the first day of May, in the fifty-fourth year of the reign of our sovereign lord George the third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, with *force and* (f) *arms*, at C. (g) aforesaid, in the county aforesaid, &c.

2. *The same with an alias dictus* (h).

* That John Robinson, late of B. in the county of L. labourer, otherwise called John Baldwin, on, &c.

(a) As to the county in which the indictment should be laid, see chap. 1. The county in the margin is in strictness no part of the indictment or caption, see p. 238. As to the use of the marginal venue, see p. 65, 237, 238.

(b) As to certainty of name, see p. 45, &c.

(c) See p. 51, 2.

(d) See p. 50.

(e) As to the time, see p. 54, 5.

(f) As to this averment, see p. 90, 1.

(g) As to the place, see p. 61, 2.

(h) See p. 50, the addition should be before the *alias dictus*. see *supra*. p. 50.

3. *The same with an alias dictus of the Christian name (i).*

Lancashire to wit. The jurors for our lord the king upon their oath present, that John Long late of the parish of A., in the county of L., labourer, otherwise called Thomas Long, on, &c.

4. *The same with an alias dictus of degree.*

Lancashire to wit. The jurors for our lord the king upon their oath present, that John Long, late of Manchester, in the county of Lancaster, Esquire, otherwise called John Long, late of the same place, gentleman, on, &c. (k).

5. *The same against a married woman.*

Lancashire to wit. The jurors for our lord the king upon their oath present, that Alice Tweedie, the wife of Alexander Tweedie, late of the parish of Preston, in the county of Lancaster, labourer (l).

6. *Conclusion to every count.*

“Against the form of the statute (n) (*or statutes*) in such case made and provided, and against the peace of our said lord the king, his crown, and dignity (o).” *If the indictment or information be at common law, it should conclude simply against the peace, &c.*

7. *Commencement of a count subsequent to the first.*

And the jurors aforesaid, upon their oath aforesaid, do further present* that the said A. B. on, &c. with force and arms, at C. aforesaid, in the county aforesaid, &c.

(i) See p. 46, 7.

(k) Foster, 5.

(l) See p. 49.

(m) See Fost. 5.

(n) See p. 228.

(o) See chap. XL

8. *Commencement of an inquisition taken before the coroner.*

Lancashire to wit. An inquisition indented, taken for our sovereign lord the king, at the parish of B. in the county of Lancaster, on the day of , in the year of the reign of our sovereign lord George the third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, before C. D. (p), one of the coroners of our said Lord the king, for the said county on view of the body of M. N. then and there lying dead, upon the oath (q) of A. B. &c. (*name the jurors,*) good and lawful men of the said county, duly chosen, and who being *then and there* (r) duly sworn, and charged to inquire for our said lord the king, when, how, and by what means the said M. N. came to his death, do upon *their oath* say (s), that, &c.

Conclusion. And that, after the said E. F. had done and committed the felony and murder aforesaid, he the said E. F. withdrew and fled for the same, (*if so in fact,*) and that, at the time of the doing and committing thereof, or at any time since, he the said E. F. had no goods or chattels, lands, or tenements within the said county, or elsewhere, to the knowledge of the said jurors, (*according to the fact,*) in witness whereof, as well the said coroner as the said A. B. C. &c. (*the names of all the jurors,*) have to this inquisition set their hands and seals, the day, year, and place, first abovementioned.

9. *Commencement of an information by the attorney-general.*

Michaelmas term, in the ——— year
of the reign of George the third.

Middlesex, to wit. Be it remembered, that A. B. esquire, attorney-general of our sovereign lord the now king, who for our sovereign lord the king prosecutes in this behalf, in his proper person comes into the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, on Wednesday next after fifteen days of Saint Martin in this same term, and for

(p) See the observations, (r) Ib.
p. 234. (s) Ib.

(q) See p. 236, 237.

our said lord the king gives the court here to understand, and be informed, that, &c.

Conclusion:—against the form, &c. (*if necessary*) and against the peace of our said lord the king, his crown, and dignity.

Whereupon the said attorney general of our said lord the king, who for our said lord the king in this behalf prosecutes, for our said lord the king prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D. in this behalf, to make him answer to our said lord the king touching and concerning the premises aforesaid, &c.

10. *Information by Master of Crown Office.*

Trinity term, 39 Geo. 3.

Yorkshire, to wit. Be it remembered, that James Templer, esquire, coroner and attorney of our lord the now king, in the court of our said lord the now king, before the king himself, who prosecutes for our said lord the king in this behalf, in his proper person comes here into the court of our said lord the king, before the king himself at Westminster, on Tuesday next after the octave of the purification of the blessed virgin Mary, in the 39th year of the reign of our sovereign lord the now king, and for our said lord the king, gives the court here to understand and be informed that C. D. late of, &c. (here state the offence with the same precision as in an indictment, and conclude each count according to the nature of the offence as follows.) To the great damage of him the said A. B., to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

And the said coroner and attorney of our said lord the king, who for our said lord the king in this behalf prosecutes, further giveth the court here to understand and be informed that the said C. D. on, &c. (state offence as in second count of an indictment.)

Whereupon the said coroner and attorney of our said lord the king, who for our said lord the king in this behalf prosecuteth for our said lord the king, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him, the said C. D. in this behalf, to make him answer to our said lord the king, touching and concerning the premises aforesaid.

11. *Presentment by a judge.*

Nottinghamshire. Be it remembered, that at the assizes and general session of oyer and terminer of our lord the king, holden at Nottingham in and for the county of Nottingham on Thursday, the 15th day of March in the thirty second year of the reign of our sovereign lord George the 3d king of Great Britain, &c. before the right honourable Sir James Eyre, knight, lord chief baron of our lord the king of his court of exchequer; the honourable Sir Alexander Thomson, knight, one of the barons of our said lord the king of the same court, and others their fellows, justices of our said lord the king appointed to take and hold the said assizes in and for the said county, and also to hear and determine all treasons, murders, felonies, and other misdemeanours committed within the same county; I the said Sir Alexander Thomson, by virtue of and pursuant to the power and authority given me in and by an act of parliament made and passed in the 13th year of our said lord the king, intituled, "an act to explain, amend, and reduce into one act of parliament, the statutes now in being for the amendment and preservation of the public highways within that part of Great Britain called England, and for other purposes," do upon my own view this day taken present, that from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient king's highway, leading from ——— in the county of ——— towards and unto Nottingham in the ——— used for all the liege subjects of our said lord the king, with their horses, coaches, carts, and carriages, to go, return, pass, and repass at their will and pleasure, and that a certain part of the king's common highway, situate, lying, and being in the parish of ——— in the said county of Nottingham to wit &c. was, and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment, of the same, so that the liege subjects of our said lord the king through the same way with their horses, coaches, carts, and carriages, could not, nor yet can go, return, pass, and repass as they ought, and were wont to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same highway, going, returning, passing, and repassing, and against the peace of our said lord the king, his crown, and dignity; and that the inhabitants of the said parish of ——— in the said

county of Nottingham, the said common highway so as aforesaid in decay, ought to repair and amend, and still of right ought to repair and amend when and so often as it shall be necessary, in testimony whereof, I, the said Sir Alexander Thomson, have to these presents set my hand and seal, this fifteenth day of March, one thousand seven hundred and ninety-two.

Alexander Thomson (L. S.)

12. *Indictment for levying public war against the king, by riotously assembling, armed with offensive weapons.*

Middlesex, to wit. The jurors for our lord the king upon heir oath present, that G. G. late of the parish of Saint Mary le Bonne, otherwise Marybone, in the county of Middlesex, esquire, commonly called Lord G. G. being a subject of our said sovereign lord George the third, by the grace of God of (t) Great Britain, France, and Ireland, king, defender of the faith, not having the fear of God before his eyes (u), nor weighing the duty of his allegiance, but being moved and seduced by the instigation of the devil, and entirely withdrawing the love and true and due obedience which every subject of our said sovereign lord the king should, and of right ought to, bear towards our said present sovereign lord the king, and (x) wickedly devising and intending to disturb the peace and public tranquillity of this kingdom, on the second (y) day of June, in the twentieth year of the reign of our said sovereign lord the now king, at the parish of Saint Margaret, within the liberty of Westminster, in the said county of Middlesex, unlawfully, maliciously, and *traitorously* (z) did compass, imagine, and intend to raise and levy war, insurrection, and rebellion against our said lord the king, within this kingdom of Great Britain; and in order to fulfil and bring to effect the said traitorous compassings, imaginations, and intentions of him the said G. G. he the said G. G. afterwards, that is to say, on the said second day of June, in the twentieth year aforesaid, with force and arms, &c. at the said parish of Saint

(t) The present style is, "of the united kingdom of Great Britain and Ireland king, defender of the faith."

(u) These allegations are not material.

(x) These allegations do not appear to be material.

(y) The precise day is not essential, see p. 61, 62,

(z) See p. 75.

Margaret, within the liberty of Westminster, in the said county of Middlesex,* with a great multitude of persons, whose names are at present unknown to the jurors aforesaid, to a great number, to wit, to the number of five hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with colours flying, and with swords, clubs, bludgeons, staves, and other weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said present sovereign lord the king, most wickedly, maliciously, and traitorously did ordain, prepare, and levy public war against our said lord the king, his supreme and undoubted lord, contrary to the duty of his *allegiance* (a), against the peace of our said lord the king, his crown, and dignity, and also against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. G. being a subject of our said sovereign lord the king; not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and entirely withdrawing the love and true and due obedience which every subject of our said sovereign lord the king should, and of right ought to bear towards our said present sovereign lord the king, and wickedly devising and intending to disturb the peace and public tranquillity of this kingdom, afterwards, to wit, on the said second day of June, in the twentieth year of the reign of our said sovereign lord the now king, and on divers other days and times between that day and the tenth day of the same month of June, at the said parish of Saint Margaret, within the liberty of Westminster, in the said county of Middlesex, unlawfully, maliciously, and traitorously did compass, imagine, and intend to raise and levy war, insurrection, and rebellion, against our said lord the king, within this kingdom of Great Britain; and in order to fulfil and bring to effect the said last-mentioned traitorous compassings, imaginations, and intentions, of him the said G. G. he the said G. G. on the said second day of June, in the twentieth year aforesaid, and on divers other days and times between that day and the tenth day of the same month of June, with force and arms, &c. at the

(a) It is unnecessary to lay the offence to have been committed against the defendant's duty of *natural* allegiance, see p. 75, and Cranburn's case, St. Tr. 8 Will. 3.

said parish of Saint Margaret, within the liberty of Westminster, in the said county of Middlesex. (*Then proceed as in the first count, from the asterisk.*)

13. *An indictment of high treason for coining shillings.*

(*Commencement as in pr. 1.*) Twenty pieces of false, feigned, and counterfeit money and coin, of pewter, lead, tin, and other mixt metals, to the likeness and similitude of the good, legal, and current money and silver coin of our said lord the king of this realm, called shillings, then and there falsely, deceitfully, feloniously, and traitorously did forge, counterfeit, and coin, against the duty of his allegiance, against the peace, &c. and against the form, &c.

14. *Indictment of high treason for having instruments for coining in custody (b).*

That A. B. late of, &c. labourer, and C. D. late of, &c. labourer, not (c) being persons employed, and neither of them being a person employed, in or for the mint or mints of our said lord the king, in the tower of London or elsewhere, and for the use and service of the said mints only, and not being persons lawfully authorized, and neither of them being lawfully authorized; by the lords commissioners of the treasury, or lord high treasurer of England for the time being, on, &c. with force and arms, at, &c. one pair of (d) *moulds* made of chalk (each of which said moulds would then make and impress (e) the figure, resemblance, and similitude of one of the sides of the lawful silver coin of this kingdom called sixpences) without any lawful authority or sufficient excuse for that purpose, knowingly and traitorously* had in the custody and possession of them the said A. B. and C. D. at, &c. against the duty of their allegiance, against the peace, &c. and also against the form of the statute, &c.

(b) The having a mould in possession is within the statute, since it is comprehended in the words *or other tool or instrument* before mentioned. Lennard's case, Leach, 105.

(c) As to the necessity of these allegations, see p. 171, 172.

(d) See note (b).

(e) See Lennard's case, Leach, 105.

15. *Indictment for hiding and concealing coining-tools.*

As in the above indictment, to the, in the dwelling-house of E. F. situate at the parish aforeaid, in the county aforeaid, did hide and conceal, against the duty of their allegiance, against the peace, &c. and also against the form of the statute, &c.*

By stat. 8 & 9 W. 3. c. 26. s. 1. it is enacted, That no smith, engraver, founder, or other person or persons whatsoever (other than and except the persons employed, or to be employed in or for his majesty's mint or mints, in the tower of London or elsewhere, and for the use and service of the said mints only, or persons lawfully authorized by the lords commissioners of the treasury, or lord high treasurer of England, for the time being), shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, dye, pattern, or mould, of steel, iron, silver, or other metal or metals, or of spaud or fine founder's earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress, the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin current within this kingdom; nor shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any edger or edging-tool, instrument, or engine, not of common use in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in his majesty's mint, nor any press for coinage, nor any cutting-engine, for cutting round blanks by force of a screw out of flatted bars of gold, silver, or other metal; nor shall knowingly buy or sell, hide or conceal, or, without lawful authority or sufficient excuse for that purpose, knowingly have in his her, or their houses, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, *dye (f)*, edger, cutting-engine, or other tool or instrument before-

(f) See an indictment against two persons for having a dye in their custody, for the purpose

of coining shillings, Cro. C. C. 111. 8th edit.

mentioned; and if any smith, engraver, founder, or other person or persons whatsoever, (other than and except as aforesaid) shall offend in any the matters or things aforesaid, then all and every such offender and offenders, their counsellors, procurers, aiders, and abettors, shall be, and is and are hereby adjudged to be, guilty of high treason; and being of the said offences, or any of them, convicted or attainted, according to the order and course of the laws of this realm, shall suffer death as in case of high treason.

By sec. 9. the prosecution must be commenced within three months.

By stat. 7, Ann, c. 25. s. 1. the stat. 8 & 9 Will. 3. c. 26. is made perpetual; and by s. 2. the makers and menders of tools, and such as mark money round the edges, &c. may be prosecuted within six months.

16. *For petit treason, against a woman, for poisoning her husband (g).*

That A. B. late of, &c. widow, late wife of J. B. late of the same place, yeoman, deceased, of her malice aforethought, contriving, devising, and intending him the said J. B. her said late husband, to deprive of his life, and him feloniously and traitorously to kill and murder, on, &c. with force and arms, at, &c. in the county aforesaid, feloniously, traitorously, wilfully, and of her malice aforethought, did mix and mingle a great quantity of deadly poison, to wit (*h*), arsenic, with a quantity of water-gruel; and that she the said A. B. then and there, feloniously, traitorously, wilfully, and of her malice aforethought, did give and deliver the said poison, so mixed with the said water-gruel as aforesaid, to the said J. B. her said then husband to be drank by him the said J. B. (she the said A. B. then and there well knowing the said arsenic to be a deadly poison); and that the said J. B. by the persuasion and at the instigation of the said A. B. the said poison so mixed with water-gruel as aforesaid (not knowing the same to be deadly poison), did then and there drink, and swallow down into his body, by which drinking and swallowing of the said poison, so mixed with water-gruel as aforesaid, the said J. B. then and there became sick and

(*g*) See p. 34, 35, 324, 325,
and pr. 19.

(*h*) See Nicholson's case,
p. 58, 59.

greatly distempered in his body, of which said sickness and distemper he the said J. B. from, &c. until, &c. at, &c. did languish, and languishing did live, on which said ——— day of ———, in the year aforesaid, the said I. B. at the parish aforesaid, in the county aforesaid, of the poison aforesaid, so drank and swallowed as aforesaid, and of the said sickness and distemper, occasioned by the drinking of the said poison, so mixed with water-gruel as aforesaid, died: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. the aforesaid J. B. her said late husband, in manner and form aforesaid, feloniously, traitorously, wilfully, and of her malice aforethought, did poison, kill, and murder, against the peace of our said lord the king, his crown and dignity.

17. Commencement of an indictment for murder or manslaughter.

Lancashire (i), to wit. The jurors for our lord the king upon their oath present, that A. B. late of the parish of C. in the county of Lancaster, labourer (k), not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil (l), on the ——— day (m) of ———, in the ——— year of the reign of our sovereign lord George the third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms (n), at the parish aforesaid, in the county aforesaid*, in and upon one E. F. (o), in the peace of God and our said lord the king, then and there (p) being, *feloniously* (q), wilfully, and *of his malice aforethought*, did make an assault, and

(i) As to the venue, see the stat. 2 & 3. Ed. 6. c. 24. and supra, p. 5. As to murders committed abroad, see the stat. 57. G. 3. c. 52.

(k) As to the name and addition, see chap. 3.

(l) This averment, though frequently introduced, is unnecessary.

(m) Both the day of the stroke and of the death must

be stated, see p. 59, 60. 2 Hale, 179. East. P. C. 344.

(n) These words are unnecessary in an indictment for murder, since the force is fully implied. 2 Haw. c. 25. s. 90, 91. 2 Hale, 87.

(o) As to the name of the person murdered, see p. 184, 185.

(p) This averment is unnecessary, see p. 184, 185.

(q) These are essential words, see p. 76, 77.

that, (*after stating the means and manner (r) of committing the offence, allege the death thus:*) of which said mortal strokes, wounds, and bruises, (*according to the fact*) the said E. F. from the said ——— day of ———, in the year aforesaid, until the ——— day of ———, in the same year, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said ——— day of ———, in the year aforesaid, the said E. F. at the parish aforesaid, in the county aforesaid, of the said mortal strokes, wounds, and bruises died (*or if the party died very soon after the stroke, &c. thus,*) of which said mortal strokes, wounds, and bruises, the said E. F. then and there instantly died. (*And conclude thus,*) and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said E. F. in the manner and by the means aforesaid, (*or last aforesaid in concluding to a second or subsequent count,*) feloniously, wilfully, and of his malice aforethought, did kill and murder (s), against the

(r) For the general rules relating to this description, see p. 91, 92.

(s) The technical term *murder*, as well as the words *feloniously* and *of malice aforethought*, are essential to the indictment, see p. 76, 77. The term *murdrum* originally meant the amerciamment which was exacted from the township when a person was privately murdered, and the offender not apprehended. Fost. 281. 1 Hale, 447. Brac. de Coron. c. 15. And in that sense it is used in the stat. of Marlbridge, 52 H. 3. 3. 26. And hence the term *murdrum* was afterwards used to signify the offence which occasioned the amerciamment, viz. *occulta occisio nullo sciente aut vidente*, Bract. cap. de murther, and every other homicide was termed *homicidium nequiter et in feloniam factum*; but there was no distinction between murder and

manslaughter as to punishment upon conviction, Fost. 302. The term was afterwards used more extensively to mean any homicide attended with circumstances which indicated preconceived malice, Staundf. c. 10. and from the 50th of E. 3. acts of general pardon constantly except murder described as of *malice prepensed*, or by words tantamount, and the stat. 13 R. 2. st. 2. c. 4 enacts, that no pardon shall be allowed for murder or for the death of a man slain by await, assault, or *malice prepensed*, unless the same be specified in the charter, &c.

The stat. 12 H. 7. c. 7. is included in the stat. 1 E. 6. c. 12. mentioned below; the stat. 23 H. 8. c. 1. s. 3. ousts of clergy all found guilty of malice prepensed, or of any abetment, procurement, &c.; the stat. 25 H. 8. c. 3. refers to the 23d of H. 8.; these are repealed by the stat. 1 E.

peace (t) of our said lord the king, his crown and dignity (u).

18. *In an indictment for manslaughter, the conclusion is, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said E. F. in manner and by the means aforesaid, feloniously did kill and slay, against the peace, &c.*

19. *Indictment against M. B. for the murder of her father by intermixing arsenic with tea and water-gruel, of which he drank at different times.*

That M. B. late of, &c. spinster, daughter of Francis Blandy, late of the same place, gentleman, deceased, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, contriving and intending him the said Francis Blandy, her late father, in his life-time to deprive of his life, and him feloniously to kill and murder, on, &c. and on divers other days and times between the said — day of —, and the — day of — in the year aforesaid, with force and arms, at the parish of H. aforesaid, in the county aforesaid, did knowingly, wilfully, *feloniously* (x), and of her malice aforethought, mix and mingle certain deadly poison, to wit, white arsenic (y), in certain tea which had been at divers days and times during the time aforesaid prepared for the use of the said Francis Blandy, to be drank by him the said Francis Blandy, she the said M. B. then and there well knowing that the said tea, with which she the said M. B. did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said Francis Blandy, with intent (z) to be then and there administered

6. c. 12. which takes away clergy from murderers of malice prepense, if found guilty, or confessing the same upon arraignment, or not answering directly or standing wilfully mute; and the stat. 4 & 5 Ph. & M. c. 4. ousts of clergy accessories before the fact. For other matters relating to this offence, see the Index, tit. Murder and Evidence.

(t) Essential, see p. 209.

(u) See p. 210, 211, and as to the conclusion in general, see p. 895.

(x) p. 76, 77.

(y) The kind of poison is not material, see p. 91, 92.

(z) See Nicholson's case, p. 58, 59.

to him, for his drinking the same; and the said tea, with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said ——— day of ———, and on the said other days and times, at the parish of H. aforesaid, in the county aforesaid (a), was delivered to the said Francis Blandy, to be then and there drank by him; and the said Francis Blandy (not knowing the said poison to have been mixed with the said tea,) did afterwards, to wit, on the said ——— day of ———, and on the said divers other days and times, there drink and swallow down into his body several quantities of the said poison, so mixed as aforesaid with the said tea; and that the said M. B. might more speedily kill and murder the said Francis Blandy, she the said M. B. on the said ——— day of ———, and on divers others days and times between the said ——— day of ———, and the ——— day of ———, in the year of the reign aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did knowingly, wilfully, feloniously, and of her malice aforethought, mix and mingle certain deadly poison, to wit, white arsenic, with certain water-gruel, which had been made and prepared for the use of the said Francis Blandy, to be drank by him the said Francis Blandy, she the said M. B. then and there well knowing that the said water-gruel, with which the poison was so mixed as aforesaid, was then and there prepared for the use of the said Francis Blandy, with intent to be then and there administered to him for his drinking of the same; and the said water-gruel, with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said ——— day of ———) and on the said other days and times last aforesaid, at the parish of H. aforesaid, in the county aforesaid, was delivered to the said Francis Blandy, to be then and there drank by him; and the said Francis Blandy (not knowing the said poison to have been mixed with the said water-gruel) did afterwards, to wit, on the said ——— day of ———, and on the day then next following, and on divers other days and times after-

(a) If the prisoner had delivered the poison, it would have been proper to aver as in Nicholson's case, p. 58, 59, "that the said M. B. the said tea, with which, &c. did with the

intent aforesaid, on, &c. at, &c. deliver to the said F. B." See p. 57, 58, 59. And if she had procured the same by an innocent agent the same averment would have been proper.

wards, and before the said ——— day of ———, there take, drink, and swallow down into his body several quantities of the said poison, so mixed as aforesaid with the said water-gruel; and the said Francis Blandy of the poison aforesaid, and by the operation thereof, became sick and greatly distempered in his body; of which said sickness and distemper of body, occasioned by the said drinking, taking, and swallowing down into the body of the said Francis Blandy of the poison aforesaid, so mixed and mingled in the said tea and water-guel as aforesaid, he the said Francis Blandy, from the said several days and times on which he had so taken, drank, and swallowed down the same as aforesaid, until the said ——— day of ———, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live: on which said ——— day of ———, in the ——— year aforesaid, at the parish aforesaid, in the county aforesaid, he the said Francis Blandy of the poison aforesaid (b), so taken, drank, and swallowed down as aforesaid, and of the said sickness and distemper thereby occasioned, did die*: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said M. B. him the said Francis Blandy, in manner and by the means aforesaid, feloniously, wilfully, and of her malice aforethought, did poison, kill, and murder against the peace, &c. (c).

20. *Indictment for murder by striking with a bucket, tried in the court of Admiralty.*

Admiralty of England (d). The jurors for our sovereign lord the king, upon their oath present, that William Kidd, late of London, mariner, on, &c. with force and arms, upon the *high sea*, near the coast of Malabar, in the East Indies, and within the jurisdiction of the admiralty of England, in and on board a certain ship, called The Adventure Galley, (whereof the said William Kidd was then commander,) then and there being, feloniously, wilfully, and of his malice aforethought, did make an *assault* (e) in and upon

(b) This allegation is material, see p. 93, 94.

(c) See the proceedings on this indictment in the 10th vol. of the State Trials, p. 1. The facts were clearly proved

against the prisoner, and she was executed

(d) Vide 2 H. 8. c. 15. s. 1. See Leach, 3d ed. 648.

(e) See p. 91, 92.

W. M. in the peace of (f) God and of our said sovereign lord the king then and there being, and to the ship aforesaid, called The Adventure Galley, then and there belonging; and that the aforesaid William Kidd, with a certain wooden bucket, bound with iron hoops (g), of the value (h) of eightpence, which he the said William Kidd then and there had and held in his right hand (i), did violently, feloniously, wilfully, and of his malice aforethought beat and strike (k) the aforesaid W. M. in and upon the right side (l) of the head of him the said W. M. a little above the right ear of the said W. M. (he the said W. M. then and there being upon the high (m) sea, in the ship aforesaid, and within the jurisdiction of the (m) admiralty of England as aforesaid,) giving (n) to the said W. M. then and there with the bucket aforesaid, in and upon the aforesaid right part of the head of him the aforesaid W. M. a little above the right ear of him the said W. M. one mortal (o) bruise; of which mortal bruise the aforesaid W. M. from the — day of —, in the — year aforesaid, until the — day of — in the year aforesaid, upon the high sea aforesaid, in the ship aforesaid, and within the jurisdiction of the admiralty of England aforesaid, did languish, and languishing did live; on which said — day of —, in the year aforesaid, he the said W. M. upon the high sea aforesaid, near the aforesaid coast of Malabar, in the East Indies aforesaid, in the ship aforesaid, called The Adventure Galley, and within the jurisdiction of the admiralty of England, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the aforesaid William Kidd him the said W. M. upon the high sea aforesaid, in the ship aforesaid, and within the jurisdiction of the admiralty of England, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought did kill

(f) Unnecessary, p. 184. n. (o).

(g) As to the description of the instrument, see p. 91, 92.

(h) p. 92, 93.

(i) As to the manner, see p. 92, 93.

(k) As to the necessity of this word, see p. 92, 93.

(l) The description must be

particular, p. 92, 93; but a variance from it is not material, if the species of death proved be the same with that alledged, p. 92, 93.

(m) This is essential, p. 20, 21.

(n) As to this allegation, see p. 244, 245. and Ld. Ray. 1363.

(o) Essential, see p. 93, 94.

and murder, against the peace of our said lord the king, his crown and dignity.

21. *Indictment for murder, and petit treason by shooting, viz. against the person who shot, and the widow of the deceased for aiding and assisting (p).*

(Commencement as in pr. 17 to the *.)

Feloniously (q), wilfully, and of their malice aforethought, and she the said E. B. also *traitorously (q)*, did make an assault upon the said S. B. the husband of her the said E. B. in the peace (r) of God and our said lord the king then and there being; and that the said M. H. a certain gun, of the value of five shillings (s), then and there charged and loaded with gunpowder and divers leaden shot, which gun he the said M. H. in both his hands then and there had and held, to, against, and upon the said S. B. then and there feloniously, wilfully, and of his malice aforethought did shoot and discharge; and that the said M. H. with the leaden shot aforesaid, out of the gun aforesaid, then and there, by force of the gun-powder, shot, discharged and sent forth as aforesaid, the aforesaid S. B. in and upon the left side of the head of him the said S. B. near the left ear of him the said S. B. then and there, with the leaden shot aforesaid, out of the gun aforesaid, by the said M. H. so as aforesaid shot, discharged, and sent forth, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said S. B. with the leaden shot aforesaid, so as aforesaid shot, discharged, and sent forth out of the gun aforesaid by the said M. H. in and upon the left side of the head of him the said S. B. near the left ear of him the said S. B. one mortal wound (t), of the depth of four inches, and of the breadth of two inches, of which said *mortal (u)* wound the said S. B. then and there instantly died; and that the said E. B. the wife of him the said S. B. then and there *feloniously, traitorously (x)*, wilfully, and of her malice aforethought was

(p) As to the joinder of these parties for offences differing in degree, see p. 34, 35. and see Leach, 3d ed. 412.

(q) See p. 184, 185.

(r) Not essential, p. 92, 93.

(s) Not essential, p. 92, 93.

(t) The description should be precise, but a variance would not be fatal, see p. 92, 93.

(u) Essential, p. 93, 94.

(x) p. 76, 77.

present, aiding, helping, abetting, comforting, assisting, and maintaining the said M. H. the felony and murder aforesaid, in manner and form aforesaid, to do and commit: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said M. H. feloniously, wilfully, and of his malice aforethought, and the said E. B. feloniously, traitorously, wilfully, and of her malice aforethought, him the said S. B. then and there, in manner and form aforesaid, did kill and murder, against the peace of our said lord the king, his crown and dignity.

22. Indictment for murder, by placing poison so as to be mistaken by the person poisoned for medicine, laying the offence in two counts.

That J. D. late of, &c. on, &c. at, &c. a certain quantity of arsenic, to wit, two drachms of arsenic, (being a deadly poison,) feloniously, wilfully, and of his malice aforethought, did put, infuse in, and mix together with water, (he the said J. D. then and there well knowing the said arsenic to be a deadly poison;) and that the said J. D. the said arsenic, so as aforesaid put, infused in, and mixed together with water, into a certain glass phial bottle, of the value of one penny, did put and pour, and the said glass phial bottle, with the said arsenic put, infused in, and mixed together with water as aforesaid contained therein, then and there, to wit, on the same twenty-ninth day of August, in the twentieth year of the reign of our said lord the king, with force and arms, at the parish aforesaid, in the said county of Warwick, feloniously, wilfully, and of his malice aforethought, in the lodging-room of the said Sir T. B. did put and place, in the place and stead of a certain medicine then lately before prescribed and made up for the said Sir T. B. and to be taken by the said Sir T. B. he the said J. D. then and there feloniously, wilfully, and of his malice aforethought, intending that the said Sir T. B. should drink and swallow down into his body the said arsenic, put, infused in, and mixed together with water as aforesaid, contained in the said glass phial bottle, by mistaking the same as and for the said medicine so prescribed and made up for the said Sir T. B. and to be by him the said Sir T. B. taken as aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that the

said Sir T. B. not knowing the said arsenic put, infused in, and mixed together with water, as aforesaid, contained in the said glass phial bottle, so put and placed by the said J. D. in the lodging-room of the said Sir T. B. in the place and stead of the said medicine then lately before prescribed and made up for the said Sir T. B. and to be taken by him the said Sir T. B. in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine then lately before prescribed and made up for, and to be taken by him the said Sir T. B. afterwards, to wit, on the thirtieth day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said J. D. as aforesaid, contained in the said glass phial bottle so put and placed by the said J. D. in the lodging-room of him the said Sir T. B. in the place and stead of the said medicine then lately before prescribed and made up for the said Sir T. B. he the said Sir T. B. did take, drink, and swallow down into his body; by means of which said taking, drinking, and swallowing down into the body of him the said Sir T. B. of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said J. D. as aforesaid, he the said Sir T. B. then and there became sick and distempered in his body, of which said sickness and distemper of body, occasioned by the said taking, drinking, and swallowing down into the body of him the said Sir T. B. of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said J. D. as aforesaid, he the said Sir T. B. on the said thirtieth day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did die: and so the jurors aforesaid, &c. (*Conclude as in pr. 19.*) That the said J. D. feloniously, wilfully, and of his malice aforethought, devising and intending to poison, kill, and murder the said Sir T. B. with a certain poison, called arsenic, on, &c. with force and arms, at, &c. knowing the said poison, called arsenic, to be a deadly poison, feloniously, wilfully, and of his malice aforethought, did mix and mingle the said poison, called arsenic, in water; and that the said J. D. feloniously, wilfully, and of his malice aforethought, did put and pour the said poison, called arsenic, so as aforesaid mixed and mingled in water, into a certain glass phial, and the said glass phial with the said poison, called arsenic, so mixed and mingled in water as aforesaid, contained therein, then and

there, to wit, on, &c. at, &c. feloniously, wilfully, and of his malice aforethought did put and place in the lodging-room of the said Sir T. B. in the dwelling-house of (y), dame Anna Maria B. widow, there situate, with intention that the said Sir T. B. should take, drink, and swallow down into his body the said poison, called arsenic, so mixed and mingled in water as aforesaid, and contained in the said glass phial: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said Sir T. B. not knowing the said poison, called arsenic, so mixed and mingled in water as aforesaid, and contained in the said glass phial, to be deadly poison, afterwards, to wit, on the said thirtieth day of August, in the twentieth year aforesaid, at the parish aforesaid, in the county aforesaid, did take, drink, and swallow down into his body the said poison, called arsenic, so mixed and mingled in water as aforesaid, and contained in the said glass phial; by means of which said taking, drinking, and swallowing down into the body of him the said Sir T. B. of the said poison, called arsenic, so as aforesaid mixed and mingled in water by the said J. D. as aforesaid, he the said Sir T. B. then and there became sick and distempered in his body; of which said sickness and distemper of body, occasioned by the said taking, drinking, and swallowing down into the body of him the said Sir T. B. of the said poison called arsenic, so as aforesaid mixed and mingled in water as aforesaid, by the said J. D. as aforesaid, he the said Sir T. B. afterwards, to wit, on the said thirtieth day of August, in the twentieth year aforesaid, at the parish aforesaid, in the county aforesaid, did die. (*Conclude as before, pr. 19.*)

23. Indictment against a man for confining and starving his wife to death.

That J. W. late of, &c. cordwainer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought contriving and intending Ann, his wife, feloniously, wilfully, and of his malice aforethought, to starve, kill, and murder, on, &c. with force and arms, at, &c. in and upon the said Ann, feloniously, wilfully, and of his malice aforethought, did make an assault, and her the said Ann, in a certain closet in a certain lodging-room, part and par-

(y) This allegation of ownership does not appear to be material.

el of a certain messuage or dwelling-house there situate, feloniously, wilfully, and of his malice aforethought, on, &c. and continually from thence until, &c. did confine and imprison; and continually from, &c. until, &c. feloniously, wilfully, and of his malice aforethought did neglect and refuse to give and administer, or permit to be given and administered, to her the said Ann, being so confined and imprisoned as aforesaid, sufficient meat, drink, victuals, and other necessities, proper and requisite for the sustenance, support, and maintenance of her body; by means of which said confinement and imprisonment, and also for want of such sufficient meat, drink, victuals, and other necessities as were proper and requisite for the sustenance, support, and maintenance of the body of her the said Ann, she the said Ann, from, &c. until, &c. in the said closet, at the parish aforesaid, in the county aforesaid, did linger and pine, and became greatly emaciated and consumed in her body, and during all that time did languish, and languishing did live; on which said ——— day of ———, in the year aforesaid, she the said Ann, at the parish aforesaid, in the county aforesaid, of such confinement and imprisonment, and for want of such sufficient meat, drink, victuals, and other necessities, as were proper and requisite for the sustenance, support, and maintenance of her body, did miserably perish and die: and so the jurors, &c. (*Conclude as in pr. 17.*)

24. *Against a woman for drowning her own child in a pond.*

Commence as in pr 17. to the.* In and upon one M. H. the daughter of her the said C. H. (she the said M. H. then and there being an infant of tender years, to wit, about the age of two years, and in the peace of God and our said lord the king,) feloniously, wilfully, and of her malice aforethought did make an assault; and that the said C. H. then and there feloniously, wilfully, and of her malice aforethought, did take the said M. H. into both hands of her the said C. H. and did then and there feloniously, wilfully, and of her malice aforethought, cast, throw, and push the said M. H. into a certain pond, there situate, wherein there then was a great quantity of water; by means of which said casting, throwing, and pushing of the said M. H. into the pond aforesaid, by the said C. H. in

form aforesaid, she the said M. H. in the pond aforesaid, with the water aforesaid, was then and there choaked, suffocated, and drowned; of which said choaking, suffocating, and drowning she the said M. H. then and there instantly died: and so the jurors, &c. (*Conclude as in pr. 18.*)

25. *Indictment for murder, as well by striking with a stick, as by choaking, squeezing, and pressing, &c.*

(*Commencement as in pr. 17, stating a joint assault.*) and that he the said J. T. with a certain large stick, of no value, which he the said J. T. in his right hand then and there had and held, her the said F. P. in and upon the head of her the said F. P. then and there feloniously, wilfully, and of his malice aforethought, divers times did strike and beat, giving to her the said F. P. by the striking and beating of her the said F. P. with the stick aforesaid, in and upon the right side of the head of her the said F. P. one (z) mortal bruise, of which said mortal bruise she the said F. P. then and there instantly died; and that the said J. M. at the time of committing the felony and murder aforesaid, by the said J. T. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, was (a) present, aiding, helping, abetting, assisting, comforting, and maintaining the said J. T. the felony and murder* aforesaid, in manner and form aforesaid, to do, commit, and perpetrate: and so the jurors aforesaid (b), upon their oath aforesaid, do say, that the said J. T. and J. M. her the said F. P. then and there, in manner and form* aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder, against the peace, &c.. (*Second count.*) In and upon the said F. P. feloniously, wilfully, and of their malice aforethought did make an assault; and that the said J. T. both his hands about the neck and throat of her the said F. P. then and there feloniously, wilfully, and of his malice aforethought did fix and fasten; and that he the said J. T. with both his hands so as aforesaid fixed and fastened about the neck and throat of the said F. P. her the said F. P. then and there feloniously, wilfully, and of his malice aforethought did choak and strangle, of which said choaking and strang-

(z) Essential, see p. 93, 94.

(a) As to the averment against

aiders and abettors, see p. 86, 87.

(b) See p. 87, 88.

ling she the said F. P. then and there instantly died ; and that (*allege the aiding and abetting, and conclude as before, inserting the word last at each of the two asterisks.*) [Third count.] In and upon the said F. P. then and there feloniously, wilfully, and of their malice aforethought did make an assault; and that he the said J. T. with a certain large stick, of no value, which he the said J. T. in his right hand then and there had and held, her the said F. P. then and there feloniously, wilfully, and of his malice aforethought, divers times did strike and beat, giving to her the said F. P. then and there, by striking and beating of her as last aforesaid, with the stick last aforesaid, in and upon the right side of the head of her the said F. P. one mortal bruise; and that the said J. T. also both his hands about the neck and throat of her the said F. P. then and there feloniously, wilfully, and of his malice aforethought did fix and fasten; and that he the said J. T. with both his hands so as last aforesaid, fixed and fastened about the neck and throat of her the said F. P. then and there did violently squeeze and press; as well of which said striking and beating of her the said F. P. in and upon the right side of the head of her the said F. P. with the stick last aforesaid, as also of the squeezing and pressing of the neck and throat of her the said F. P. with both the hands of him the said J. T. as last aforesaid, she the said F. P. then and there instantly died. (*Allege the aiding and abetting, and conclude as in the preceding count.*)

26. *Indictment for murder, by beating with fists and kicking on the ground, where no visible mortal wound can be discovered.*

Commence as in pr. 17. And that the said W. W. then and there feloniously, wilfully, and of his malice aforethought did strike, beat, and kick the said E. D. with his hands and feet in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. D. and did then and there feloniously, wilfully, and of his malice aforethought cast and throw the said E. D. down unto and upon the ground with great force and violence there, giving unto the said E. D. then and there, as well by the beating, striking, and kicking of him the said E. D. in manner and form aforesaid, as by the casting and throwing of him the said E. D. down as aforesaid, several mortal strokes, wounds, and bruises in and upon the head

breast, back, belly, sides, and other parts of the body of him the said E. D. of which said mortal strokes, wounds, and bruises he the said E. D. from, &c. until, &c. at, &c. did languish, and languishing did live; on which said — day of —, in the year aforesaid, the said E. D. at, &c. of the several mortal strokes, wounds, and bruises aforesaid died. (*Conclude as in prec. 17.*)

27. *Indictment against a defendant who is accessory in one county to a murder committed in another (c).*

Middlesex, to wit. (Assault, as in pr. 17, alleged to have been committed jointly.) The aforesaid Robert Carliel, with a certain gun, called a pistol, of the value of five shillings, then and there charged with gunpowder and one leaden bullet, which gun the said Robert Carliel, in his right hand then and there had and held in and upon the aforesaid John Turner, then and there feloniously, voluntarily, and of his malice aforethought, did shoot off and discharge, and the aforesaid Robert Carliel, with the leaden bullet aforesaid, from the gun aforesaid then and there sent out, the aforesaid John Turner in and upon the left part of the breast of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there, with a leaden bullet as aforesaid, near the left pap of him the said John Turner, one mortal wound, of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid John Turner, at *London (d)* afore-

(c) This was the indictment used against Lord Sanchar, upon which he was convicted and executed. See a full account of the proceedings upon that occasion, 9 Co. 117. It is observable, that though the indictment is founded upon the stat. 2 & 3 E. 6. c. 24. it does not conclude against the form of the statute, nor does this appear to be necessary, for though, before that statute, an accessory in one county to a murder in another, could not have been indicted in either,

that was for want of the authority in the jurors to inquire; and the statute merely remedies the defect without making any alteration either in the nature of the offence or in the measure of punishment, which remained as at common law. See p. 228.

(d) It was deemed necessary in this indictment, which was framed upon the stat. 2 & 3 E. 6. c. 24. expressly to allege the perpetration of the murder in the true county, see p. 140. p. 7, 8.

said, in the parish and ward aforesaid, instantly died ; and that James Irweng, feloniously, wilfully, and of his malice aforethought, then and there was(e) present, aiding, assisting, abetting, comforting, and maintaining the aforesaid Robert Carliel to do and commit the felony and murder aforesaid, in form aforesaid ; and so the aforesaid Robert Carliel and James Irweng the aforesaid John Turner, at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of our lord the now king, his crown and dignity ; and that one Robert Creighton, late of the parish of St. Margaret, in Westminster, *in the county of Middlesex* (f), esq. not having the fear of God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid, by the aforesaid Robert Carliel and James Irweng, in manner and form aforesaid done and committed, that is to say, on the 10th day of May, in the 10th year of the reign of our Lord James, by the grace of God, &c. the aforesaid, Robert Carliel (g), at the aforesaid parish of St. Margaret, in Westminster, in the county of Middlesex aforesaid (h), to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his forethought malice, did stir up, move, abet, counsel, and procure, against the peace of our said lord the king that now is, his crown and dignity.

(e) As to the form of charging a defendant as an aider and abettor, see p. 86, 87.

(f) See the stat. p.

(g) See the observations, p. 141, 142.

(h) By stat. 4 & 5 Ph. & M. c. 4. all persons that shall maliciously *command, hire, or counsel* any person to commit petit treason, wilful murder, &c. every such offender being

attainted, or who shall stand mute, &c. or challenge peremptorily above 20, &c. shall be excluded from the benefit of clergy. And it is proper to introduce the words of the statute into the indictment; yet an indictment has been holden sufficient which wholly dropt the words of the statute. See p. 142, 143. Lodowick Grevil's case, And. 195. and *supra*, p. 226, 227.

28. *Against a servant for petit treason and murder (i).*

That Henrietta Radbourne late of, &c. widow, late servant of Hannah Morgan, widow, her mistress, on, &c. with force and arms, at &c. in and upon the said Hannah, the mistress of the said Henrietta, feloniously, traitorously, and wilfully, and of her malice aforethought, did make an assault; and that the said Henrietta, with a certain stick, having a bayonet fixed at the end thereof, of the value of two shillings, which stick she the said Henrietta in both her hands then and there had and held, in and upon the top of the head of her the said Hannah, did then and there feloniously, traitorously, wilfully, and of the malice aforethought of her the said Henrietta Radbourne, strike, cut, stab, and penetrate, giving to the said Hannah Morgan by such striking, cutting, stabbing, and penetrating of the said Hannah Morgan, with the bayonet so fixed at the end of the stick aforesaid, in and upon the top of the head of her the said Hannah Morgan, one mortal wound, of the length of one inch, and of the depth of half an inch, of which mortal wound the said Hannah Morgan, from the said 31st. day of May, in the year aforesaid, until the 11th day of July, in the year aforesaid, in and at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 11th day of July, in the year aforesaid, she the said Hannah Morgan, of the mortal wound aforesaid, died: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Henrietta Radbourne her the said Hannah Morgan, her said mistress, in manner and by the means aforesaid, feloniously, traitorously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity.

(i) *R. v. Radbourne*, Leach, 512. See the observations on pr. 16. The verdict was entered thus, "*guilty of the murder but not guilty of the trea-*

son;" and the judges held that the conviction of murder upon an indictment so framed was proper, see p. 324, 325, 326.

29. *Against one for shooting the deceased, and against another as aiding and abetting (k).*

(Commencement as in pr. 17, alleging a joint assault.) And that the said John Taylor a certain gun, called a carbine, of the value of ten pounds, then and there charged with gunpowder and a leaden bullet, which said gun he the said John Taylor in both his hands then and there had and held, at and against the said Samuel Gillham, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge; and that the said John Taylor, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded, to, at, and against the said Samuel Gillham as aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, strike, penetrate, and wound the said Samuel Gillham in and upon the right side of the head of him the said Samuel Gillham, near his right temple, giving to him the said Samuel Gillham then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at, and against the said Samuel Gillham; and by such striking, penetrating, and wounding the said Samuel Gillham as aforesaid, one mortal wound in and through the head of him the said Samuel Gillham, of which said mortal wound the said Samuel Gillham did then and there instantly die; and that the said Alexander Shaw then and there feloniously, wilfully, and of his malice aforethought, *was present, aiding, helping, abetting, comforting, assisting, and maintaining* the said John Taylor in the felony and murder aforesaid, in manner and form aforesaid, to do and commit, &c. &c. (see pr. 27.)

30. *For strangling with a handkerchief (l).*

(Comm. as in pr. 17 to *.) Being in a certain coach,

(k) *R. v. Taylor and Shaw Leach*, 398. The jury found *Shaw* guilty and acquitted *Taylor*; and a majority of the judges were of opinion, that the conviction was good, but

the prisoner afterwards received a free pardon. See p. 81, 82.

(l) From the St. Tr. vol. 4. p. 484. *R. v. Harrison*, for the murder of Dr. Andrew Clenché. The prisoner was convicted and executed.

with one E. F. and a certain man yet unknown, in and upon the said E. F. violently, feloniously, and of his malice aforethought, did make an assault; and that the said A. B. with the help and assistance of the said man unknown, with a pocket handkerchief with a coal in the same being put, of the value of twopence, about the neck of him the said E. F. then and there feloniously, voluntarily, and of his malice aforethought, did put, fasten, and bind, and that the said A. B. with the help and assistance of the said man unknown, with the said handkerchief, with the coal aforesaid in it, about the neck of the aforesaid E. F. then as aforesaid put, fastened, and bound him the said E. F. then and there with force and arms, feloniously, wilfully, and of his malice aforethought, did choak and strangle, of which choaking and strangling of the said E. F. he the said E. F. then and there instantly died. (*Conclusion as in pr. 17.*)

**31. Indictment for murder, where the death was occasioned by
• wilfully riding over a person with a horse.**

(*Commencement as in pr. 17.*) And that the said A. B. then and there riding upon a certain horse, of the price of twenty pounds, the said horse in and upon the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said E. F. with the horse aforesaid, then and there, by such riding and forcing, did throw to the ground; by means whereof the said horse, with his hinder feet, him the said E. F. so thrown to and upon the ground as aforesaid, in and upon the hinder part of the head of him the said E. F. did then and there strike and kick, thereby then and there giving unto him the said E. F. in and upon the said hinder part of the head of him the said E. F. one mortal fracture and contusion; of which said mortal fracture and contusion he the said E. F. then and there instantly died. (*Conclude as in preced. 17.*)

32. By casting a stone.

(*Commencement as in pr. 17.*) And that the said A. B. a certain stone, of no value, which he the said A. B. in his right hand then and there had and held, in and upon the right side of the head, near the

right temple of her the said M. then and there feloniously, wilfully, and of his malice aforethought did cast and throw; and that the said A. B. with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid M. in and upon the right side of the head, near the right temple, of her the said M. then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound; giving to the said M. by the casting and throwing of the stone aforesaid, in and upon the right side of the head, near the right temple, of her the said M. one mortal wound, of the length of one inch, and of the depth of one inch, of which said mortal wound she the said M. (*state the languishing, and conclude as in pr. 17.*)

33. *Indictment for felony and murder by stabbing with a knife.*

(*Commencement as in pr. 17.*) And that he the said A. B. with a certain *knife*, of the value of sixpence, which he the said A. B. in his right hand then and there had and held, the said J. M. in and upon the left side of the belly, between the short ribs, of him the said J. M. then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said J. M. then and there, with the knife aforesaid, in and upon the aforesaid left side of the belly, between the short ribs of of him the said J. M. one mortal wound, of the breadth of three inches, and of the depth of six inches, of which said mortal wound (*state the languishing or immediate death, according to the fact, and conclude as in pr. 17.*)

34. *Indictment against the driver of a cart for manslaughter.*

(*Commence as in pr. 17. to*.*) In the king's highway there, in and upon one E. F. feloniously and wilfully did make an assault, and a certain cart, of the value of five pounds, then and there drawn by two horses, of the value of ten pounds, which he the said A. B. was then and there driving in and along the said highway, in and against the said E. F. feloniously did force and drive, and him the said E. F. did thereby then and there throw to and upon the ground, and did then and there feloni-

ously force and drive one of the wheels, to wit, the off wheel of the said cart, against, upon, and over the head of him the said E. F. then lying upon the ground; and thereby did then and there give to the said E. F. in and upon his head, one mortal fracture and contusion, of which the said E. F. then and there instantly died. (*Conclude as in pr. 18.*)

35, Indictment under the statute 1 J. 1. c. 8, s. 2. for felony by stabbing (m).

(*Commence as in pr. 17.*). And that the said A. B. with a certain drawn sword, of the value of five shillings, which he the said A. B. in his right hand then and there had and held, the said E. F. in and upon the left side of the neck of him the said E. F. the said E. F. then and there not having any weapon drawn, *and (n)* not having then first stricken the said A. B. then and there feloniously did strike, *stab and thrust*; and that the said A. B. with the sword aforesaid, to the said E. F. in and upon the left side of the neck of him the said E. F. one mortal wound, of the breadth of three inches, and of the depth of six inches, then and there feloniously did give; of which said mortal wound the said E. F. then and there instantly died. (*Conclude as in pr. 18 (o).*)

(*m*) The enacting words are "shall stab or thrust any person that hath not then any weapon drawn, *or* that hath not then first stricken the party, which shall so stab or thrust." The offender is ousted of clergy upon conviction, if the party stabbed die within six months after the stroke, although malice prepense be not proved. But this stat. has been holden to be but declaratory of the common law. Kel. 55. 1 Hale, 456. Fost. 298.; and therefore the same circumstances, which will justify, excuse, or alleviate at common law, will have their

weight in prosecutions grounded on the statute.

(*n*) It seems that both these allegations are necessary, 1 Hale, 68.; for though the exceptions are disjunctively stated, this is plainly contrary to the sense of the statute.

(*o*) It is unnecessary to conclude against the form of the statute, since the offence is felony at common law. See 1 Hale, 468.; but the conclusion would not be improper. As to the intention of the legislature in making this statute, see p. 85, 86.

36. *Indictment for the murder of a bastard child (p).*

That A. B. late of, &c. spinster, on, &c. being big with a *male* (q) child, on the same day and year, at, &c. by the providence of God, did bring forth the said child alive (r), of the body of her the said M. *alone* (s) *and in secret*; which said male child, so being born alive, by the laws of this realm was a bastard; and that the said A. B. afterwards, to wit, on, &c. as soon as the said male bas-

(p) By the stat. 43 G. 3. c. 58. repealing the stat. 21 J. 1. c. 27. from and after the said first day of July, in the said year of our Lord one thousand eight hundred and three, the trials in England and Ireland respectively of women charged with the murder of any issue of their bodies, male or female, which being born alive would by law be bastard, shall proceed and be governed by such and the like rules of evidence and of presumption, as are by law used and allowed to take place in respect to other trials for murder.

§ 4. Provided always, and be it enacted, That it shall and may be lawful for the jury, by whose verdict any prisoner, *charged* with such murder as aforesaid*, shall be acquitted, to find, in case it shall so appear in evidence, that the prisoner was delivered of issue of her body, male or female, which, if born alive, would

have been bastard, and that she did, by secret burying, or otherwise, endeavour to conceal the birth thereof; and thereupon it shall be lawful for the court, before which such prisoner shall have been tried, to adjudge that such prisoner shall be committed to the common gaol or house of correction for any time not exceeding two years.

(q) The sex is material.

(r) If upon view of the child it be testified by one witness, by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances, this (says Lord Hale) I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death or not.

(s) These words do not appear to be necessary.

* In order to warrant the confinement under this section, it seems to be necessary to charge, that the child was born a *bastard*, but that the *concealment* need not be averred.

tard child was born, with force and arms, at, &c. in and upon the said child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she the said M. with both her hands about the neck of him the said child then and there fixed, him the said child then and there feloniously, wilfully, and of her malice aforethought did choak and strangle, of which said choaking and strangling the said child then and there instantly died: and so the jurors aforesaid, upon their oath aforesaid, do say, That the said A. B. him the said male bastard child, in form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace, &c. (t).

ASSAULTS.

37. *Common Commencement.*

Lancashire, to wit. The jurors for our lord the king upon their oath present, that A. B. late of C. in the county of L. labourer, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms, at the parish of D. in the county aforesaid,* in and upon one E. F. did make an assault.

Commencement of a subsequent count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. on, &c. with force

(t) For special verdicts in case of murder see Leach, 411. Such a verdict should find that the fact was committed in the

county laid in the indictment. Howell's case. Leach, 411. and see *R. v. Glover*, Kel. 111.

and arms, at, &c. in and upon the said E. F. did make an assault, &c.

Conclusion.—And other wrongs to the said E. F. then and there did, to the great damage of the said E. F. against the peace of our said lord the king, his crown and dignity.

38. *Indictment for a common assault.*

(*Commencement as in pr. 37.*) And him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of. (*Conclude as in pr. 37.*)

39. *Indictment for assaulting a constable in the execution of his office.*

(*Commencement as in pr. 37 to the*.*) in and upon one E. F. (then being one of the constables (*u*) of the said parish of C. in the said county of D. in the peace of God and our said lord the king, and in the due execution of his said office, then and there also being,) did make an assault; and him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of. (*Conclude as in pr. 37. and add a count for a common assault.*)

40. *Indictment for an assault and false imprisonment.*

(*Commencement as in pr. 37.*) and him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and him the said E. F. then and there unlawfully and injuriously, against the will and without the consent of the said E. F. and also against the laws of this realm, without any legal warrant, authority, or justifiable cause whatsoever, did imprison and detain for a long time, to wit, for the space of ——— hours then next following*. (*Conclude as in pr. 37, and add a count for a common assault.*)

(*u*) This is a sufficient allegation, that he was a constable, see p. 162, 163, 170, 171; and the allegation would be satisfied by

evidence, that he acted as such. See Gordon's case, Leach, 581. 4 T. R. 366. 5 T. R. 607. 3 T. R. 632.

41. * *For the like and obtaining five guineas for discharging.*

(*As in the last to the**, and then add,) and until he the said E. F. had paid to him the said A. B. the sum of five pounds and five shillings, of the monies of the said E. F. for his enlargement, and other wrongs, &c.

42. *For the like, and obtaining a note for discharging.*

And until he the said E. F. for his delivery from the said imprisonment, had signed and given to the said A. B. a note under the hand of the said E. F. whereby he the said E. F. promised to pay to the said A. B. the sum of ten pounds, &c.

43. *Indictment for an assault with intent to ravish (x).*

(*Commencement as in pr. 37.*) And her the said E. F. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, with an intent her the said E. F. *against her will*, then and there feloniously to ravish and carnally know. (*Another count for a common assault.*)

44. *Indictment against two persons for assaulting a married woman, with an intent that one of them should ravish her.*

(*Commencement as in pr. 37. to the**.) In and upon E. the wife of one H. S. did make an assault, and her the said E. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, with intent that he the said J. H. should then and there feloniously, and against the will of the said E. ravish and carnally know

(x) If the offence of rape appears to have been actually committed, the prisoner should be acquitted, since the misde-

meanor merges in the felony. See p. 41, note (f), Harwood's case, East. P. C. 411.

her the said E. (*Conclusion as in pr. 37, add a count for a common assault.*)

45. *Indictment for assaulting a woman with quick child, so that the child was brought forth dead.*

(*Commencement as in pr. 1.*) In and upon M. the wife of one W. E. then and there being big with a quick child, did make an assault; and her the said M. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, by reason whereof she the said M. afterwards, to wit, on, &c. at, &c. did bring forth the said child dead. (*Conclusion as in pr. 37.*)

46. *Indictment for assaulting one of the collectors of a turnpike in the execution of his office.*

(*Commencement as in pr. 1.*) In and upon one E. F. (then and there being one of the collectors and receivers of the monies payable by virtue of a certain act of parliament made in the thirteenth year of the reign of his present majesty king George the third, intituled, "An act to explain, amend, and reduce into one act of parliament the general laws now in being for regulating the turnpike-roads in that part of Great Britain called England; and for other purposes," and in the execution of his said office, then and there also being,) did make an assault, and him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of. (*Conclude as in pr. 37. and add a count for a common assault.*)

47. *Indictment for an assault on a boy, with an intent to commit sodomy.*

(*Commencement as in pr. 37. to *.*) in and upon one J. H. an infant of the age of ten years, did make an assault; and him the said J. H. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of, with an intent that most horrid, detestable, and sodomitical crime (among Christians not to be named) called *buggery*, with the said J. H. against the order of nature, then and there

feloniously and wickedly to commit and do, to the great displeasure of Almighty God. (*Conclude as in pr. 37, and add a count for a common assault.*)

48. *Indictment for an assault, with an intent to murder (y).*

(*Commencement as in pr. 37. to *,*) with a certain drawn sword, which he the said A. B. in his right hand then and there had and held, in and upon one S. W. did make an assault, with an intent him the said S. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder. (*Conclusion as in pr. 37. and add a count for a common assault.*)

49. *Indictment for assaulting the driver of a chaise, and with the off-wheel of a cart overturning the chaise.*

(*Commencement as in pr. 37. to the *,*) in and upon one R. C. in the peace of God and our said lord the king, and in a certain chaise drawn by one horse, in the king's highway, then and there being, did make an assault; and that the said A. B. then and there driving one horse drawing a cart, did then and there, in the highway aforesaid, unlawfully, maliciously, and violently, drive the said horse, so as aforesaid drawing the said cart, to and against the said chaise, and by such driving did then and there, in the highway aforesaid, unlawfully and maliciously force the said cart against the said chaise; and that he the said A. B. with the off-wheel of the said cart, did then and there, in the highway aforesaid, unlawfully and ma-

(y) If upon evidence it appear, that the offence (if the party had been killed) would have amounted to manslaughter only, the defendant should be acquitted on the first count. The defendant, a soldier, in marching in file along the Strand, wantonly jostled the prosecutor off the pavement, who thereupon struck him with a small stick which he had in his hand, on which the defen-

dant aimed a blow at the prosecutor with his bayonet fixed on his musquet, and thrust him under the ear; and Lord Kenyon being of opinion, that if death had ensued, it would have been manslaughter only, directed an acquittal on the first count. Mitton's case, East. P. C. 411. Bacon's case, 1 Lev. 146. 1 Sid. 230. Staundf. 17.

liciously overturn the said chaise, in which the said R. C. then and there was as aforesaid, by means of which overturning of the chaise aforesaid, he the said R. C. then and there was grievously hurt, bruised, and wounded. (*Conclude as in pr. 37. and add a count for a common assault.*)

50. *Indictment for an assault and beating out an eye.*

(*Commencement as in pr. 37 to *.*)

In and upon M. the wife of one J. W. violently did make an assault, and her the said M. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of*; and that she the said A. B. with her right hand, the said M. in and upon the left eye of her the said M. then and there unlawfully, violently, and maliciously did strike; by means whereof, she the said M. then and there the use, sight, and benefit of her said left eye entirely lost, and was deprived of; and also, by means of the premises she the said M. became sick, weak, languid, and distempered, and remained and continued so sick, weak, languid, and distempered for a long time, to wit, from thence until the day of the taking of this inquisition. (*Conclusion as in pr. 37, and add a count for a common assault.*)

51. *For the like, and tearing the hair off the prosecutor's head.*

And also that she the said A. B. did then and there unlawfully and injuriously seize and take hold of the said M. by the hair of her head, and did then and there, with great force, wrath, and violence, pull and drag the said M. by the same, by means whereof she the said A. B. did then and there unlawfully, cruelly, and injuriously pull and tear the hair of the head of her the said M. off by the roots; whereby the head of her the said M. was grievously wounded and hurt, and also she the said M. was put to great pain and torture. (*Conclusion as in pr. 37.*)

52. *Indictment for an assault, and encouraging a dog to bite.*

(Commencement as in pr. 37.) And did then and there unlawfully incite, provoke, and encourage a certain dog of and belonging to the said A. B. to bite him the said E. F. by means whereof the same dog did then and there grievously bite the said E. F. in and upon the right leg of him the said E. F.; and the said leg of him the said E. F. was thereby grievously hurt and wounded. (Conclusion as in pr. 37.)

53. *Indictment for an assault, and rescuing goods distrained for rent.*

That on, &c. and continually afterwards, until the 25th day of March, in the year aforesaid, one A. B. did hold of one J. W. a certain room or apartment, with the appurtenances, being part and parcel of a certain messuage or dwelling-house of him the said J. W. situate in the parish of, &c. by virtue of a certain demise thereof made by and from the said J. W. to the said A. B. at and under the rent of _____, reserved and made payable by the said demise to the said J. W. on the said 25th day of March, in the year aforesaid; and that on the said twenty-fifth day of March, in the year aforesaid, the said sum of _____ was due, in arrear, and unpaid for the rent aforesaid, by virtue of the said demise to him the said J. W. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. on the twenty-sixth day of March, in the year aforesaid, did fraudulently and clandestinely convey and carry off and from the said demised premises his goods and chattels; that is to say, one pewter dish, &c. (*here mention the goods,*) of the value of the said sum of _____, with intent to prevent the said J. W. the lessor aforesaid, from distraining the same for the arrears of the said rent so reserved; so in arrear, due, and unpaid, as aforesaid, whereupon the said J. W. afterwards, and within the space of five days next ensuing the said conveying and carrying off the same goods, to wit, on the twenty-eighth day of March, in the year

aforesaid, at the parish of ———, in the county aforesaid, did find the said goods and chattels, and the same goods and chattels so found did then and there, in due form of law, seize as a distress for the said rent so due and in arrear as aforesaid, and being also then unpaid, and the said goods and chattels in his custody and possession for the cause aforesaid then and there had; and that the said A. B. late of, &c. labourer, afterwards, to wit, on the same day and year last aforesaid, with force and arms, at the parish last aforesaid, in the county aforesaid, in and upon the said J. W. did make an assault; and the said goods and chattels (so as aforesaid for the cause aforesaid taken and seized) out of the possession and against the will of the said J. W. (z) unlawfully and injuriously did take, rescue, and carry away (the said sum of ———, so due for rent as aforesaid, being then wholly due and unsatisfied to the said J. W.) (*Conclude as in pr. 37. and add a count for a common assault.*)

54. Indictment for assaulting a game-keeper in the execution of his duty.

(*Commencement as in pr. 37. to the*,*) in the manor of M. into a certain field and close of and belonging to W. S. there lying and being, unlawfully and injuriously did enter, and in and upon one E. F. (then being

(z) By stat. 8 Ann. ch. 14. s. 2. it is enacted, That in case any lessee of any messuages, lands, or tenements, upon the demise whereof any rents shall be reserved or made payable, shall fraudulently and clandestinely convey and carry off from such demised premises his goods or chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of such rent reserved as aforesaid, it shall and may be lawful for such lessor or landlord, or any person by him for that purpose lawfully empowered, within the space of

five days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of such rent, and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord in and upon such demised premises, for such arrears of rent; and by the stat. 11 Geo. 2. c. 19. s. 1. the time is enlarged to thirty days.

game-keeper of the said manor duly deputed, authorized, and appointed by G. H. esquire, then and yet being lord of the manor aforesaid,) in the due execution of his duty as a gamekeeper of the said manor, then and there also being, did make an assault; and him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of. (*Conclusion as in pr. 37. and add a count for a common assault.*)

55. *Indictment for an assault, by casting a person on the ground, and kicking him.*

(*Commencement as in pr. 37.*) and him the said E. F. did then and there beat, bruise, wound, and ill-treat, so that his life was greatly despaired of; and that the said A. B. with both his hands then and there violently cast, flung, and threw the said E. F. to, upon, and against the ground, and him the said E. F. in and upon his head, neck, breast, back, sides, and other parts of his body, with both the feet of him the said A. B. then and there violently and grievously did kick, strike, and beat, giving to the said E. F. then and there, as well by such flinging, casting, and throwing of him the said E. F. as also by such kicking, striking, and beating of the said E. F. as aforesaid, in and upon the head, neck, breast, sides, back, and other parts of the body of him the said E. F. divers bruises, hurts, and wounds. (*Conclude as in pr. 37. and add a count for a common assault.*)

56. *Indictment for an assault, and casting into a pond of water with intent to suffocate.*

(*Commencement as in pr. 37.*)

And him the said G. M. then and there did beat, bruise, wound, and ill-treat, so that his life was greatly despaired of; and that the said A. B. with a certain large stick, which he the said A. B. in his right hand then and there had and held, then and there gave and struck the said G. M. many violent and grievous blows and strokes in and upon his head, neck, arms, breast, and other parts of his body, and did with both the hands of him the said A. B. then and there unlawfully, wickedly, maliciously, and violently, cast, push, fling, and throw the said G. M.

into a certain pond, there situate and being, wherein there then was a large quantity of filthy water and mud, and did then and there keep, press down, and confine the said G. M. in and under the said water and mud for a long space of time, to wit, for the space of five minutes then next following, with intention him the said G. M. then and there feloniously, wilfully, and of his malice aforethought, to suffocate and drown in the said water and mud, and him the said G. M. by means thereof to kill and murder; by means of which said casting, pushing, flinging, and throwing of him the said G. M. into the said pond as aforesaid, and keeping, pressing down, and confining the said G. M. in and under the said water and mud as aforesaid, he the said G. M. was then and there grievously hurt and bruised in his body, and in great danger of being suffocated and drowned in the said water and mud there: *(conclusion as in pr. 37. —Second count: commencement as in pr. 37,)* and him the said G. M. then and there did beat, bruise, wound, and ill-treat, so that his life was greatly despaired of; and that the said A. B. with a certain large stick, which he the said A. B. in his right hand then and there had and held, gave and struck the said G. M. many violent blows and strokes in and upon his head, breast, sides, back, and other parts of his body, and thereby greatly cut, bruised, and wounded the head, breast, sides, back, and other parts of the body of the said G. M. by means of which said last-mentioned blows and strokes he the said G. M. became sick, weak, and distempered, and remained and continued so sick, weak, and distempered, for a long time to wit, from the time of giving and striking the same until the day of taking this inquisition. *Conclusion as in pr. 37. and add a count for a common assault.*

57. *Indictment for a riot, and assault on a surveyor of a turnpike-road in the execution of his office, and for preventing the labourers from working.*

That R. W. late of the parish of N. in the county of M. labourer, C. W. late of the same place, labourer, &c. *(the names and additions of the rioters who are known)* and divers other evil-disposed persons, to the number of forty and more, to the jurors aforesaid as yet unknown,

bring rioters, routers, and disturbers of the peace of our lord the now king, and not regarding the laws and statutes of this kingdom, on, &c. with force and arms, at, &c. unlawfully, riotously, routously, and tumultuously did assemble and meet together*, to disturb the peace of our said lord the king, and to hinder and retard the due execution of a certain act of parliament made and passed in the thirty-first year of the reign of his late majesty George the second, late king of England, intituled (a) "An act for repairing the road from the village of M. to the bridge foot at the town of C. in the counties of M. and Gloucester," and to hinder, oppose, and stop certain workmen then employed in and about the working and making a certain turnpike-road, in pursuance of the said act of parliament, in and through a certain place in the parish aforesaid, called the marshes; and that, being so assembled and met together as aforesaid, they the said R. W. &c. *(the names of all the rioters who are known)* together with the said other evil-disposed persons, to the jurors aforesaid as yet unknown, then and there unlawfully, riotously, routously, and tumultuously did hinder, oppose, and stop the said workmen, so employed as aforesaid, from proceeding in and performing the said work, and then and there unlawfully, riotously, routously, and maliciously did make an assault upon one R. T. (then and there being a surveyor of the said turnpike-road, within the district of N. in the said act mentioned, duly appointed by (b) nine at least of the trustees acting within the said district, in pursuance of the said act of parliament, at a meeting of the said trustees then lately before held within the said district, under their hands and seals, for the viewing the condition of the said roads within the said district to be made, repaired, and amended, in pursuance of the said act, and to see that the same were repaired, and for other services in the said act mentioned and expressed) in the due execution and performance of his said office then and there being, and him the said R. T. then and there unlawfully, riotously, routously, and maliciously did beat, bruise, wound, and ill-treat, so that his life was greatly despaired of: and other wrongs to the

(a) Care must be taken to set out the proper title of the act.

(b) As the words of the act may be; but it does not appear

to be necessary to set out the appointment specially. See p. 162, 163, 164. *R. v. Holland*, 5 T. R. 623. 4 T. R. 366. and see the second count.

said R. T. then and there unlawfully, riotously, and routously did, to the great damage, danger, and fear of the said R. T. to the great hindrance and obstruction of the said workmen in the execution and performance of the said work, in contempt, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. W. &c. (*as before*) afterwards, to wit, on, &c. with force and arms, at the parish aforesaid, in the county of M. aforesaid, in and upon the said R. T. (then and there being surveyor of the said turnpike-road within the district of N. aforesaid, duly appointed according to the directions of the above-mentioned act) in the due execution and performance of his said office, then and there being, did make an assault, and him the said R. T. did then and there beat, bruise, wound, and ill-treat, so that his life was greatly despaired of. (*Conclude as in the first count, and add a count for a common assault.*)

58. *Indictment against J. W. and his wife, for cruelly beating and ill-treating a parish apprentice, and keeping her from necessary food.*

(*Commencement as in pr. 37. to the *, stating a joint assault.*) In and upon one E. O. then and there being an infant of tender years (c), that is to say, of the age of thirteen years or thereabouts, and then and there being the servant and under the control of the said J. W. did make an assault, and with certain rods, whips, sticks, and cords, which they the said J. W. and H. then and there had and held in their hands, her the said E. O. violently, cruelly, and immoderately did beat, scourge, and strike, and did then and there pull and strip, and did force and compel the said E. O. to pull and strip, from off the body of her the said E. O. certain cloaths and wearing apparel where-with the said E. O. was then and there cloathed and covered, so that the said E. O. was then and there naked and uncovered, and her the said E. O. as well whilst she was so covered and cloathed with the said cloaths and wearing apparel, as whilst she was so naked and uncovered, did cruelly and barbarously force and compel to

(c) An indictment for ill-treating a servant by refusing sufficient food and cloathing must allege that the servant

was of tender years and under the control of the defendant. *R. v. Ridley*, 2 Camp. 650.

work and labour violently, immoderately, and beyond her strength, in the business of the said J. W. for the space of thirteen hours then next following, and the said E. O. so working and labouring as aforesaid, did then and there shut up, confine, and keep in a certain room there for all the time aforesaid, without giving or affording to her the said E. O. or permitting her to have sufficient meat, drink, and food, for her nourishment and support during that time; and such assaulting, beating, scourging, striking, and otherwise ill-treating her the said E. O. in manner and form aforesaid they the said J. W. and H. at fifty other different times, on fifty other different days then next following, at the parish aforesaid, did barbarously, cruelly, and inhumanly repeat and reiterate, in, upon, towards, and against the said E. O. so being the servant of the said J. W. as aforesaid, with an intent her the said E. O. then and there feloniously, wilfully, and of their malice aforethought, to kill and murder. *Conclusion as in pr. 37.)*

(Second count, commencement as in pr. 37.) In and upon the said E. O. then and there being such infant, and the servant of the said J. W. as aforesaid, in the peace of God and our said lord the king then and there also being, did make an assault, and did then and there, by and with divers menaces, barbarously, wickedly, cruelly, and inhumanly force, compel, and oblige the said E. O. to go into a certain rivulet there, (she the said E. O. then and there being naked, and the water of the said rivulet then and there being frozen and very cold,) and did cruelly and barbarously force and compel the said E. O. so being naked in the said rivulet, to wash her body in the water of the said rivulet, to the great pain and torture of the said E. O. and to the great damage and impoverishment of her health and strength of body, with an intent, &c. *(as in the last count.)*

(Third count, commencement as in pr. 37.) In and upon the said E. O. then and there being such infant, and the servant of the said J. W. as aforesaid, and in the peace of God and our said lord the king then and there also being, did make an assault, and did then and there most wickedly, barbarously, and cruelly, take and hold the said E. O. so near to a certain large fire, then burning there, that the said E. O. thereby became and was grievously burnt, scorched, and hurt, and did then and there dash, fling, push, and throw the said E. O. with great force and violence, to, upon

and against the ground there, and thereby greatly hurt, crushed, bruised, and wounded the said E. O. in and upon her head, neck, arms, sides, back, and other parts of her body, whereby the said E. O. became sick, weak, languid, and distempered, and remained and continued so sick, weak, languid, and distempered for a long time, to wit, from thence until the day of taking of this inquisition. (*Conclusion as in pr. 37.*)

59. *Indictment for entering a public house, making a noise therein, and threatening bodily harm to the owner.*

(*Commencement as in pr. 37 to the *.*) Unlawfully did enter into the dwelling-house of one R. N. there situate, (the same being a public victualling-house, and in which divers liege subjects of our said lord the king were then and there peaceably met and assembled) with intention to disturb the peace of our said lord the king, and that the said A. B. so being in the said dwelling-house, did then and there unlawfully, wilfully, injuriously, and obstinately, remain there for a long space of time, that is to say, for the space of one hour and more, without the license and against the will of the said R. N. and did then and there unlawfully, obstinately, and injuriously refuse to depart and go away from and out of the said dwelling-house, upon the reasonable request of the said R. N. then and there made to him for that purpose; and that the said A. B. did then and there unlawfully, vehemently, and turbulently menace and threaten great bodily hurt to the said R. N. then and there being in his dwelling-house; and did there make a great noise in disturbance of the peace of our said lord the king, and greatly misbehave himself in the same dwelling-house. (*Conclusion as in pr. 37, and add a count for a common assault.*)

60. *Indictment for an assault and riot in a dwelling-house, and removing goods.*

(*Commencement as in pr. 37, to the *.*) To disturb the peace of our said lord the king, and being so assembled and met together, the dwelling-house of one J. P. spinster, there situate, then and there unlawfully, riotously, and routously did break and enter, and in and upon the

said J. P. in the said dwelling-house then and there being, unlawfully, riotously and routously did make an assault, and her the said J. P. then and there unlawfully, riotously, and routously did beat, bruise, wound, and ill-treat, so that her life was greatly despaired of, and did then and there unlawfully, riotously, and routously put and force the said J. P. from and out of the said dwelling-house, and did then and there unlawfully, riotously, and routously put, cast, fling, and throw divers goods and chattels, to wit, six wooden chairs and five pewter plates of her the said J. P. of the value of forty shillings, then being in the said dwelling-house, from and out of the same, and thereby greatly broke, damaged, and spoiled the said goods and chattels: and other wrongs to the said J. P. then and there unlawfully, riotously, and routously did, to the great damage of the said J. P. against the peace, &c. (*Add a count for a common assault.*)

61. *For an assault on a deputy gaoler, in the execution of his office.*

That A. B. late of the castle of Lancaster, in the county of Lancaster, labourer, on _____ with force and arms, at the castle of Lancaster, at Lancaster aforesaid, in the said county, in and upon one J. C. then and there being deputy keeper of his majesty's gaol of the castle of Lancaster, and having the custody of divers persons confined in the said gaol, and then and there being in the due execution of his said duty and office of deputy keeper as aforesaid, did make an assault, and him the said J. C. did beat, bruise, wound, and ill-treat, so that his life then and there was greatly despaired of, and other wrongs to the said J. C. then and there did, to the great damage of the said J. C. and against the peace, &c. (*Add a count for a common assault.*)

62. *For an assault on an excise officer (d).*

(*Commence as in pr. 37. to the *.*) In and upon one

(d) *R. v. Brady, Leach, 949.* excise officers, as well as to cus-
on the stat. 24 G. 3. c. 47. tom-house officers and officers
s. 15. In this case it was holden, of the navy.
that the statute extends to ex-

C. D. then and there being an officer of our lord the king, in the service of the excise of our said lord the king, duly constituted and appointed, and then and there being on shore in the due execution of his office and duty as such officer as aforesaid, in seizing and securing, to and for the use of our said lord the king, a large quantity, to wit, (*set out the goods*) which were then and there liable to be seized by the said C. D. as such officer as aforesaid, unlawfully and violently did make an assault, and him the said C. D. so being then and there on shore, in the due execution of his said office and duty, in manner aforesaid, unlawfully and forcibly did hinder, oppose, and obstruct, to wit, at, &c. and other wrongs, &c. to the great damage, &c. against the form of the *statute*, &c. and against the peace, &c.

63. *Indictment for an assault, false imprisonment, and rescue.*

That the mayor and senior bailiff of the town and county of the town of Poole, the judges of the weekly court of record, of the said town and county, on, &c. at, &c. by their writ issued out of the said court, bearing date, &c. directed to W. C. and J. Brown, *serjeants at mace of the said town and county* (e), (and then and there being the officers of the said court duly authorized and appointed for the execution of the process thereof) did command them to take W. B. if he should be found in their bailiwick, and keep him safely, &c. so that they might have his body before the mayor, &c. on, &c. to answer J. S. in a plea of trespass on the case, which same writ, on, &c. at, &c. within the juris-

(e) This indictment was holden to be defective, for not averring that J. B. was the proper officer of the court. 5 East, 304. *R. v. Osmer*. It was also objected, that it did not appear that an affidavit had been made of a debt to the amount of 10*l.*; and that the sum sworn to was indorsed upon the writ, which is rendered necessary by the stat. 12 G. 1. c. 29. and 19 G. 3. c. 20.

And the court held, that judgment could not be given as for a common assault and imprisonment upon a general verdict of guilty; for taking the whole count together, the jury had found that there was an assault and imprisonment, but committed under circumstances which justified the defendant. See *Grant v. Bagge*, 3 East, 128.

diction of the said court, was delivered to the said J. Brown, *one of the serjeants at mace of the said town and county, to be executed* and so duly authorized as aforesaid, in due form of law; by virtue of which said writ, the said J. B. being such officer and so authorized as aforesaid, afterwards, &c. on, &c. at, &c. at the town and county aforesaid, and within the jurisdiction of the court aforesaid, was proceeding to arrest the said B. W. according to the exigency of the said writ; and that the said B. W. (*the defendant*) late of, &c. labourer, with others unknown, afterwards, to wit, on, &c. with force and arms, in the town and county aforesaid, and within the jurisdiction of the said court, in and upon the said J. B. then and there being one of the serjeants at mace aforesaid, and in the due execution of his said office, did make an assault, and also imprison him; and that the said A. B. and the said others unknown, with force and arms, &c. did then and there violently prevent the said J. B. from arresting the said B. W. as by the same writ he was commanded, &c. (*Conclusion as in pr. 37.*)

64. *Indictment under the stat. 9 G. 1. c. 22. (f) for shooting at a person in his dwelling-house.*

That A. B. late of, &c. labourer, being an ill-designing and disorderly (g) person, of a wicked and malicious disposition, and not regarding the laws and statutes of this realm, nor the pains and penalties therein contained, on, &c. with force and arms, at, &c. in the

(f) This act enacts, that “if *any* person or persons shall wilfully and maliciously shoot at any person in any dwelling-house, or other place, or shall forcibly rescue any person being lawfully in custody of any officer, or other person, for such offence; or if any person or persons shall, by gift or promise of money, or other reward, procure any subject to him or them in any such unlawful act, every person so offending, be-

ing thereof lawfully convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.” See 43 G. 3. c. 58. and the indictments founded upon it, *infra*.

(g) These words are used in the preamble of the statute, but it seems to be unnecessary to introduce them into the indictment, since they are no part of the description of the offence.

county aforesaid (*h*), with a certain gun, *loaded with gun-powder, and a leaden bullet*, which he the said A. B. in both his hands then and there had and held, he the said A. B. with the said gun, so being loaded as aforesaid, did then and there *wilfully, maliciously* (*i*), unlawfully, knowingly, and feloniously shoot at C. D. (the said C. D. then and there being in his own dwelling house (*k*)). against the form of the statute, &c. and against the peace &c. (*Add a count omitting the words "loaded with gun-powder, &c."*)

An indictment charging several with a single shooting may be framed thus (*l*).

(*h*) The offender may be tried in any county, see p. 13, but the offence ought to be laid in the true county, see p. 19.

Where one actually shoots, and others are present aiding and abetting, it does not appear to be necessary to introduce more than one count, since it is clear, that all may be charged as principals. See p. 31. 81. the Coalheavers' case, Leach, 76. 3 T. R. 105.

In Wills's case, East. P. C. 414. Kent, Sp. Ass. 1786. the first count charged, that the prisoner, and divers others, to the jurors unknown, shot at J. P.; the second count alleged, that a person unknown wilfully, &c. shot at J. P.; and that the prisoner was present aiding and abetting, &c. and alleged in conclusion, that both committed the felony. Mr. J. Ashurst informed the jury, that the prisoner went in confederacy with others to make an attack upon Mr. M'Ullock's house, and came armed with an intention to oppose all resistance; and that, in the prosecution of that purpose, the prisoner, or any of his associates, shot at the

prosecutor; then they should find the prisoner guilty. And the judges were of opinion, that the direction was right, and that the Coalheavers' case was good law.

(*i*) These words are essential, see p. 212.

(*k*) The words of the statute are, *in any dwelling-house or in any other place*, and therefore, this allegation is unnecessary. In Durore's case, p. 178. the owner's name was alleged, and a variance from it in evidence was holden to be fatal. But in prosecutions for robbery, it has been holden, that such an averment might be rejected as surplusage, see p. 178: and Leach. 62, 66, 294. 3 Ed. and probably the same was holden upon an indictment under this statute. In Harris's case, East P. C. 415. on any indictment under this act it was objected, that the prisoner, having fired at the party within his own house, was not within the statute; but the judges held, that the objection was unfounded.

(*l*) See the Coalheavers' case, Leach, 76.

That A. B. late of ———, in the county of ———, labourer, C. D. late of, &c. labourer, E. F. late of, &c. labourer, being evil, designing, and disorderly persons, and of wicked and malicious minds and dispositions, on, &c. with force and arms, at, &c. in and upon one G. H. did unlawfully, wilfully, maliciously, and feloniously, make and assault, and with a certain gun, loaded with gunpowder, and divers leaden bullets, to wit, three leaden bullets, unlawfully, wilfully, maliciously, and feloniously, did then and there shoot at the said S. P. against the form of the statute, &c. and against the peace, &c.

65. *Indictment of felony, by slitting a nose, and against the aider and abettor.*

(Commencement as in pr. 33. to the *, stating the assault to have been made jointly.) Contriving and intending one E. C. then and yet being a subject of our said lord the king, to maim and disfigure, at, &c. with force and arms, in and upon the said E. C. on purpose, and of their malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault, and that the said J. W. with a certain iron bill, of the value of one penny, which he the said J. W. in his right hand then and there had and held, the nose of the said E. C. on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention the said E. C. in so doing, in manner aforesaid, to maim and disfigure; and that the aforesaid A. C. at the time the aforesaid felony, by the said J. W. in manner and form aforesaid, was done and committed, to wit, on, &c. at, &c. with force and arms, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present, knowing of and privy to the committing of the said felony, aiding and abetting the said J. W. in the felony aforesaid, in manner and form aforesaid done and committed; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. W. and A. C. on, &c. at, &c. with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did

do and commit, against the peace, &c. and against the form, &c. (m).

66. *For striking a person with a weapon in a church yard (n).*

(Commencement as in pr. 33 to the *.) In a certain churchyard belonging to the same parish, and there situate, maliciously did strike one E. F. spinster, with a certain weapon made of iron and steel, called a sword, which he the said A. B. then and there had and held in his right hand against the form, &c. and against the peace, &c.

(If the weapon be drawn with intent to strike another, then say,) with his right hand did draw a certain weapon

(m) By stat. 22 & 23 Car. 2. c. 1. s. 7. if any person or persons, from and after the 24th day of June, in the year of our Lord 1671, on purpose, and of malice aforethought, and by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any the manners before mentioned, such his majesty's subjects, that then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, (knowing of and privy to the offence aforesaid,) shall be guilty of felony, without benefit of clergy.

(n) By stat. 5 & 6 Edw. 6. c. 4. s. 3. if any person shall maliciously strike another with any weapon, in any church or church-yard, or shall draw any weapon, in any church or

church-yard to the intent to strike another with the same weapon, that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses, before the justices of assize, justices of oyer and terminer, or justices of peace in their sessions, by force of this act, shall be adjudged, by the same justices before whom such person shall be convicted, to have one of his ears cut off: and if the person or persons so offending have none* ears, whereby he or they shall receive such punishment as is before declared, that then he or they* be marked and burned in the cheek with an hot iron having the letter F. whereby he or they may be known to be fray-makers and fighters; and besides, that every such person to be and stand *ipso facto* excommunicated, and be excluded from the fellowship and company of Christ's congregation:

* So in stat.

called a hanger, to the intent to strike one M. P. with the same weapon, against the form of the statute, &c. and against, &c. as above. (*But if a person draw a weapon to the intent to strike, and actually strike, charge the drawing with intent, &c. as above, and add a count for the striking as in the first precedent.*)

67. *For an assault with intent to rob under the stat. 7 G. 2. c. 21 (o).*

(*Commencement as in pr. 1.*) In and upon C. D. *unlawfully, maliciously, and feloniously*, did make an assault,

(o) The stat. 7 G. 2. c. 21. enacts, "that if any person or persons shall, with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by *menaces*^{*}, or in or by any forcible or violent manner, demand any money, goods, or chattels, of or from any other person or persons, with a felonious intent to rob or commit robbery upon such person or persons, that then such person so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and be liable to be transported as in cases of felony." The act is in the disjunctive; therefore the indictment must allege an assault with an offensive weapon, with an intent &c. or that the defendant did, by menaces &c. demand money, goods, or chattels with a like intent; and if it do not, will be defective. *R. v. Jackson and Randall*, Leach, 303. *R. v. Remnant*, 5 T. R. 169. Pegges's case East. P. C. 420.

In Parfait's case, Leach, 23.

East. P. C. 416. the indictment charged an assault with a pistol with intent to rob; it appeared that the defendant did not make any demand or motion, or offer to demand the prosecutor's money, but only held a pistol in his hand towards the prosecutor who was on the coach-box, and bade him stop; and Lord C. J. Willes and Chappel, J. are said to have holden that the case was not within the act, because there was no demand. But, as Mr. East, in his Pleas of the Crown observes, the words of the act are in the disjunctive, and where the indictment is framed upon the first branch of it a demand is unnecessary, and it is for the jury to decide with what intent the assault was made. The defendant, Thomas, (Leach, 372,) was indicted for a felonious assault on J. Lowe, with a pistol, with intent to rob him, it appeared that the prosecutor was in a chaise, and the prisoner, after following it for some time, presented a pistol

* Query, Whether *menaces*, are confined to threats of bodily harm, *semble* not per Buller, J. Donolly's case. East. P. C. 717.

with a certain offensive weapon, to wit, a (*p*) pistol which he the said A. B. in his right hand then and there had and held, with a felonious intent the monies of the said C. D. from the person and against the will of the said C. D. feloniously and *violently* (*q*) to steal, take, and carry away, against the form, &c. and against the peace, &c.

§8. *For a felonious assault with intent to spoil cloaths, &c.*

(Commence as in *pr.* 1.) In a public street and highway there, called ———, in and upon one E. M. spinster, in the said public street and highway, then and there being, *wilfully, maliciously, and feloniously* did make an assault, with an intent to tear, spoil, cut, and deface the garments and cloaths of her the said E. M. and

at the post-boy, bidding him stop, with many violent oaths, but making no demand of money; the carriage stopped, but the prisoner, perceiving that he was pursued, immediately rode away; the court held that the evidence was not sufficient, for the charge was not of an assault on the postillion with intent to rob him, but for an assault on M. Lowe with intent to rob him, of which there was no evidence; and upon another indictment against the same defendant for an assault on *Dring* the postillion, he was acquitted upon the same evidence; since it appeared that the intent was not to rob the post-boy, for when he presented the pistol to him and bade him stop, he made no demand upon him, but went up to the person in the chaise, *East. P. C.* 418. In the case of *Trusty v. Howard*, *Sess. Pap.* 735. the defendants were indicted for a felonious assault with an offen-

sive weapon, with intent to rob, it appeared that one of them, presenting a pistol to the prosecutor, bade him stop, which he did, but called out for assistance; on this, the prisoners threatened to blow his brains out if he called out any more, which he nevertheless continued to do, and the men were taken, and, though no demand of money was made they were convicted and transported.

(*p*) In *Sharwin's case*, *East. P. C.* 421. it was holden that an allegation of an assault with an offensive weapon called a wooden staff, was satisfied by evidence of an assault with a stone, see p. 92.

(*q*) In *Monteth's case* the indictment was holden to be defective for omitting this word, *Leach*, 890. *Sess. Pap.* 1300. and 1325. *East. P. C.* 420. for the indictment must allege an intent to rob, which always includes force and *violence*.

with force and arms, did, in the said public street and highway *then and there* (r) wilfully, maliciously, and feloniously tear, spoil, cut, and deface one printed linen gown of the value of thirty shillings, of the goods and chattels of the said E. M. being part of the garments and cloaths of her the said E. M. on her person then and there being in wear, against the form, &c. and against the peace, &c. (s).

By stat. 6 Geo. 1. c. 23. s. 11. it is enacted, that if any person or persons shall, at any time or times, wilfully and maliciously assault any person or persons, in the public streets or highways, with an intent to tear, spoil, cut, burn, or deface the garments and cloaths of such person or persons, that then all and every such person or persons so offending, being thereof lawfully convicted, shall be adjudged to be guilty of felony; and every such felon shall be subject and liable to like pains and penalties as in cases of felony; and the courts by and before whom he, she, or they shall be tried, shall have full power and authority of transporting such felons for the space of seven years.

69. *Indictment for feloniously assaulting a privy counsellor in the execution of his office* (t).

(Commencement as in pr. 1.) In and upon the right honourable Sir E. H. knight, one of the privy coun-

(r) It must appear that the assault and spoiling were continuous, see p. 59.

(s) It has been holden, that to support an indictment under this statute, it must appear that the primary intention of the defendant was to injure the cloaths, and that if his intention was to injure the person the case is not within the statute, *R. v. Williams*, Leach, 426. ; but qu. as to the principle of this opinion, and see *R. v. Coke* and *Woodburn*, 6 St. Tr. 804.

(t) By stat. 9 Ann. c. 16. it is enacted, that if any person

shall attempt to kill, or unlawfully assault, strike, or wound any of her majesty's privy counsel, in the execution of his office in council, or in any committee of council, being convicted thereof in due form of law, he is thereby declared to be a felon, and shall suffer death, as in cases of felony, without benefit of clergy.

The occasion of the act was this, Robert Harley, esq. (afterwards Earl of Oxford) was stabbed by Anthony Guiscard, who was then under examination before a committee of the privy counsel.

sellors of our said lord the king, and in the due execution of the said office in council then and there being, feloniously did make an assault, and him the said Sir F. H. did then and there feloniously strike and wound, against the form, &c. and against the peace, &c.

70. *For challenging to fight, on account (u) of money won at play under the stat. 9 Ann. c. 14 (x).*

(*Commencement as in pr. 33.*) And then and there unlawfully and maliciously did challenge C. D. a peaceable subject of our said lord the king, to fight with him the said A. B. on account of money then and there won by the said C. D. (y) of him the said A. B. by then and there gaming and playing at dice with the said A. B. at a certain game called hazard (z), to the great damage of the said C. D. against the form of the statute, &c. and

(x) Buller J. was of opinion, that if the game was over before the assault began, it could not be said to have arisen out of the game, and that it was necessary, in order to bring a case within the statute, that the assault should arise out of the play and during the time of playing. East. P. C. 423. Brist. Summ. Ass. 1787. But the contrary has been decided as to the time of the assault. *R. v. Darley*, 4 East. and 2 Starkie's L. Ev. p. 73. which may be within the statute, although not committed till the day after.

(z) Which enacts, that if any person or persons whatsoever, shall assault and beat, or challenge or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or abetting at any of the games aforesaid, (viz. cards,

dice, tennis, bowls, tables, or other game or games whatsoever,) such person or persons, &c. shall, being thereof lawfully convicted upon an indictment or information to be exhibited against him for that purpose, forfeit to her majesty, &c. all his goods and chattels and personal estate whatsoever, and shall also suffer imprisonment, without bail or mainprize, in the common goal of the county where such conviction shall be had, during the term of two years.

(y) In order to support the indictment it does not appear to be necessary that the money should have been won by the prosecutor, or that it should be alleged by whom the money was won.

(z) The game seems to be immaterial, therefore this allegation had better be omitted.

against the peace, &c. (*2nd count, commencement as in pr. 33.*) And then and there unlawfully and maliciously did provoke C. D. to fight with him the said A. B. on account of money then and there won by the said C. D. from the said A. B. by gaming and playing at dice, to the great damage, &c. *against the form, &c. and against the peace, &c.*

Indictment for the same, alleging an assault and beating.

(*Commencement as in pr. 33.*) And then and there did beat the same C. D. on account of money then and there won by the said C. D. from him the said A. B. by then and there gaming and playing at dice, to the great damage, &c. (*conclude as in the last precedent.*)

71. *For an assault, against the stat 36 G. 3. c. 9 (a).*

(*Commencement as in pr. 1.*) In and upon one E. F. did wilfully and maliciously make an assault, and him the said E. F. did then and there wilfully and maliciously beat, with intent to deter and hinder him the said E. F. from then and there buying corn, at the parish aforesaid in the county aforesaid. (*Conclude as before.*)

72. *For an assault, &c. with intent to stop grain, &c.*

In and upon one E. F. who was then and there driving a certain cart loaded with wheat, unlawfully and mali-

(a) If any person shall wilfully and maliciously beat wound, or use any other violence to or upon any person or persons, with intent to deter him or them from buying of corn or grain in any market *or other place* within this kingdom, or unlawfully beat or wound the driver of any waggon, cart, or other carriage or horse loaded with wheat, flour, meal, malt, or other grain, with intent to stop such wheat, &c. such person, being thereof

lawfully convicted before any two or more justices of the peace of the county, &c. or before the justices of the peace in open sessions, shall be sent to the common goal or house of correction, there to continue and be kept to hard labour, not less than one nor exceeding three months.

A person so offending a second time, and being lawfully convicted, to be deemed guilty of felony, and to be transported for fourteen years.

ciously did make an assault, and him the said E. F. did then and there unlawfully and maliciously beat, with intent to stop such wheat. (*Conclusion as before, and add a count for a common assault.*)

73. Indictment for a rape.

(*Commencement as in pr. 1.*) In and upon one A. P. spinster, in the peace of God and our said lord the king then and there being, violently and feloniously did make an assault, and her the said A. P. *against the will* (b) of her the said A. P. then and there feloniously did *ravish* (c), and carnally know (d) against the form (e) of the statute, &c. and against the peace, &c.

74. Indictment for carnally knowing and abusing a female child under the age of ten years (f).

(*Commencement as in pr. 1.*) In and upon one E. F.

(b) The absence of previous consent is a material ingredient in the offence, as described in 13 E. 1. stat. 1. c. 24. see below.

(c) The word *rapuit* is essential, and is not supplied by the words *carnaliter cognovit*, see p. 72.

(d) But the words *carnaliter cognovit* do not appear to be essential, 2 Haw. c. 25. s. 56. 11 H. 4. 14. See Staun. 81. Co. Litt. 137. 2 Ins. 180. where Lord Coke says, that *rapere* legally signifies as much as *carnaliter cognoscere*; and if so, the latter allegation appears to be unnecessary, for the use of the latter words is to specify the nature of the crime rather than any means of circumstances of the particular case. But it would not be prudent to omit these words.

(e) The indictment usually concludes, against the form of the statute. But rape was an-

ciently a capital felony. 1 Ins. 190. 2 Ins. 180. 433. 1 Hale, 627, 8. 1 Haw. c. 41. s. 7. 4 Bl. Comm. 210. 212.

By the stat. of West. 3 E. 1. c. 13. the offence was reduced to a trespass; but by stat. of West. 2. it was again made felony, the stat. enacting, that ravishment without any consent before or after, and ravishment with force without consent, should be punished with judgment of life and member. Since, therefore, an indictment at the present day rests upon this statute, it would not be proper to omit the conclusion *contra formam*, 1 Hale, 632. Dy. 304. 6 H. 7. 5.; at all events this conclusion is necessary in case of an appeal. 2 Haw. c. 23. s. 6.

Principals in the 1st and 2d degree are ousted of their clergy by the stat. 18 Eliz. c. 7. and 3 W. & M. c. 9.

(f) The stat. 18 Eliz. c. 7.

spinster, a woman child under the age of ten years, to wit, of the age of nine years and upwards, feloniously did make an assault, and her the said E. F. then and there wickedly, unlawfully, and feloniously, did carnally know and abuse, against the form of the statute, &c. and against the peace, &c.

75 Indictment of felony for taking a woman having substance, &c. against her will, under the stat. 3 H. 7. c. 2. (g).

(Commencement as in pr. 1. (h).) In and upon one M. W. spinster, then and yet being under the age of fourteen years, and a maid, and only daughter and heir of P. W. esquire, then lately deceased, she the said M. W. then and there having substance (i) in moveable goods to the value of one thousand pounds, of lawful money of Great Britain, and in lands and tenements to the value of fifteen hundred pounds by the year, of like lawful money, did make an assault, and her the said M. then and there did put in great danger of her life, and her the said M. with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, feloniously, and against the will of her the said M., violently did take, force, and convey away, with intention that he the said A. B. for lucre (k), and the sake of such her substance, feloniously should marry, and have the said M. to wife; and that the said A. B. afterwards, to wit, on, &c. by the assent procurement, and abetment of the said A. M. J. J. and C. the wife of F. C. late of, &c. gentleman, and W. C. late of

s. 4. takes away the benefit of clergy from such as shall unlawfully and carnally know and abuse any woman child under the age of ten years.

Mr. East, E. P. C. 448. is of opinion that the word ravish ought to be omitted, because the crime is created by stat. 18 Eliz.; but that stat. appears, from its terms, to be declaratory of the law, affirming that it extended to that particular case, and if so the averment is essential.

(g) This is essential; 1 Haw. 660. 1 Haw. c. 42. s. 34.

(h) As to the venue, see p. 2.

(i) The indictment must either allege that the female was an heiress, or that she had substance in goods and moveables, or in lands and tenements. 1 Hale, 660. 1 Haw. c. 42. s. 34. 3 Ins. 61.

(k) This allegation does not appear to be essential, but *Ld. Hale* says it is safest to use these words, see p. 179.

the same parish and county, clerk, with force and arms, at, &c. feloniously, and for lucre of the said substance of the said W. M. did marry (*l*), and had the said W. M. to wife, against the form of the statute, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid do further present, that the said A. M., J. J., C., the wife of F. C. and W. C. on the said fourteenth day of November, in the year aforesaid, at, &c. in the county of ———, with force and arms, knowingly and feloniously were assisting, aiding, procuring, assenting, abetting, and maintaining the aforesaid A. B. in doing and committing the felony aforesaid, against the form of the statute, &c. and against the peace (*m*), &c.

(*l*) It must either be alleged that she was married to the defendant or to some one by his procurement, or that she was defiled. 1 Hale, 660. 3 Ins. 61.

(*m*) By stat. 3 Hen. 7. c. 2. (reciting, where women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances been oftentimes taken by mis-doers, contrary to their will, and after married to such mis-doers, or to other by their assent, or *defoiled*, to the great displeasure of God, and contrary to the king's laws, and disparagements of the said women, and utter heaviness and discomfort of their friends, and to the evil *example* of all others;) it is therefore ordained, established, and enacted, that what person or persons from henceforth that taketh any woman so against her will unlawfully, that is to

say, maid, widow, or wife, that such taking, procuring, and abetting the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such mis-doers, takers, and procurators to the same, and *receitors*, knowing the said offence in form aforesaid, be henceforth reputed and judged as principals: provided alway, that this act extend not to any person taking any woman, only claiming her as his ward or bond woman.

By stat. 39 Eliz. c. 9. s. 1. clergy is taken away from persons who shall offend against the above statute.

This act of Elizabeth extends only to those who shall be principals: or procurors, or accessories before such offence committed, s. 2.

By stat. 4 & 5 Ph. & M. c. 8. s. 3. if any person, above the age of fourteen years, shall unlawfully take or convey, or cause to be taken or conveyed, any maid or woman child un-

76. *Indictment for having two wives at one and the same time, against the stat. 1 J. 1. c. 11. (n).*

(*Commencement as in pr. 1.*) At the parish of N. (o) in the county of M. (p), did marry one C. D. spinster, and her the said C. D. then and there had for his wife; and that the said A. B. afterwards, to wit, on, &c. with force and arms, at the parish of S. M. in the said county of M. feloniously did marry and take to wife one

married, being within the age of sixteen years, out of or from the possession, and against the will, of her father, mother, or guardian, he shall suffer two years imprisonment, or pay such fine as shall be assessed by the court.

§ 4. If any person shall so take away, or cause to be taken away, and deflower any such maid or woman child, or shall, against the will or knowledge of the father, or, if he be dead, of the mother having tuition of such child, contract matrimony with her by secret letters, messages, or otherwise, he shall be imprisoned for five years, or pay such fine as shall be assessed by the court, half to the king, and half to the parties aggrieved.

(n) The stat. 1 J. 1. c. 11 enacts, that if any person or persons within England, being married, do marry any person or persons, the former husband or wife being alive, every such offence shall be felony, and the person or persons so offending shall suffer death as in cases of felony. By the stat. 18 Eliz. c. 7. s. 2, 3. the offender, be-

sides being burnt in the hand may be imprisoned for a year by stat. 19 G. 3. c. 74. s. 3. fine and whipping may be substituted for burning, and by stat. 35 G. 3. c. 67. persons convicted under the stat. 1 J. 1. c. 11. shall be subject to the same fines, &c. with those convicted of petit larciny.

(o) The first marriage may, it seems, be alleged according to the fact, though the second took place in a different county, and the offender may be indicted in a third, where he is apprehended by the provision of the stat. 1 J. 1. c. 11. see p. 11.

(p) The county in which the indictment is laid. Qu. whether the concluding allegation be necessary according to the decisions in *Berwick's case*, *Fost.* 10. *supra*, p. 11.; for the clause of the act 1 J. 1. c. 11. s. 1. has been construed to mean the county where the party is imprisoned, see p. 11. n. (g). *Hutton*, 131.; and it appears, from the record itself, that he is brought to the bar in the custody of the sheriff, see p. 29.

E. F. spinster, and to the said E. F. was then and there married (the said C. D. his former wife, being (q) *then* living and in full life) against the form, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. afterwards, to wit, on (r) the first day of September, in the year last aforesaid, was apprehended and taken in the said parish of ———, in the county of ———.

77. Indictment for having two husbands at one and same time.

That Elizabeth, the wife of A. J. H. late of ———, on, &c. being then married, and then the wife of the said A. J. H. with force and arms, at, &c. did feloniously marry and take to husband E. P. duke of ———, (the said A. J. H. her husband, being then alive,) against the form, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Elizabeth heretofore, to wit, on, &c. at, &c. by the name of Elizabeth C. did marry the said A. J. H. and him the said A. J. H. then and there had for her husband; and that she the said Elizabeth, being married, and the wife of the said A. J. H. afterwards, to wit, on, &c. with force and arms, at &c. feloniously did marry and take to husband the said E. P. (the said A. J. H. her husband, being then alive) against the form, &c. and against the peace, &c.

78. An indictment for sodomy (s).

(Commencement as in *pr.* 1.) In and upon T. L. then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair with the said T. L. and then and there carnally knew the said T. L. and then and there feloniously, wickedly, and diabolically, and against the order of nature, with the said

(q) See p. 67.

(r) See p. 11.

(s) By the stat. 25 H. 8. c. 6. 5 Eliz. 17. and 3 & 4 W.

& M. c. 9. s. 2. this offence is made felony without benefit of clergy.

T. L. did commit and perpetrate that detestable and abominable crime of buggery (*t*) (not to be named among Christians,) to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

OFFENCES AGAINST THE HABITATION:

79. *Indictment for burglary (u).*

That A. B. late of ———, in the county of ———, labourer, on, &c. about the hour of one of the night (*x*) of

(*t*) This word is essential. Post. 424. Co. Ent. 351. 3 Ins. 59.

(*u*) By the stat. 18 Eliz. c. 7. and 3 W. & M. c. 9. s. 2. the offender is ousted of clergy.

Also, accessories before the fact are ousted by the latter statute.

By the stat. 1 Ed. 6. c. 12. s. 10. persons attainted or convicted of breaking any house, by day or by night, any person being therein, and being thereby put in fear or dread, shall be excluded from the benefit of clergy.

By the stat. 5. Anne, c. 31. s. 5. any person who shall receive, harbour, or conceal any burglars, &c. knowing them to be such, shall be taken as accessory to the said felony, and, being convicted, shall suffer death as a felon convict.

The stat. 12 Anne, c. 7. declares and enacts, that if any person shall enter into the mansion or dwelling-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night time break the said house to get out of the same, such person is and shall be adjudged to be guilty of burglary, and shall be ousted of clergy, in the same manner as if such person had broke and entered the said house, in the night time, with intent to commit felony there.

(*x*) It is usual to allege the hour; see p. 57. and to state it to be in the night of the preceding day, though after 12 o'clock: The day itself is not material; see p. 57.

the same day, with force and arms, at the parish (y) aforesaid, in the county aforesaid, the *dwelling house* (z) of one C. D. there situate, *feloniously* (a) and *burglariously* (a) did *break and enter* (b), with intent (c) the goods and chattels of the said C. D. in *the said dwelling house* (d) then and there being, then and there feloniously and burglariously to steal, take and carry away, and one gold watch, of the value of thirty pounds (*describe the property and value of each article according to the fact*) of the goods and chattels of (d) the said C. D. in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against the peace, &c.

(y) The parish should be correctly stated; a variance would be fatal.

(z) The house must be described as the *dwelling-house* of the real tenant, see p. 73. and the st. 12 Ann. c. 7. and this is the proper description, though part only of the house be separately occupied. The situation is material. Burglary may also be committed in a *church* or *chapel*. The personal property must be described as in larceny, where an actual stealing is averred. If a mere intent to steal be alleged, the ownership should still be correctly averred, p. 194. If the offence be committed in an out house within the curtilage it should be laid to have been committed in the dwelling house or in a stable &c., being part of the dwelling house. Dobbs's case. East. P. C. 513. Garland's Case, ib. 493.

(a) These words are essential, see p. 73. and so are the words, *dwelling-house*, and in the night. The means of breaking and entering are immaterial.

(b) The *intention* is included in the words *feloniously* and *burglariously*, &c. but it must be further shewn, that the breaking and entry was done to commit a *felony*, which felony should be specified. But an averment that he did then and there commit a specific felony is a sufficient averment of the intention. A statutable felony will support the indictment. 1. Haw. c. 38. s. 38. *R. v. Knight and Roffey*. East. P. C. 510.

(c) Essential. *R. v. Lyon*, Leach. 221. 3rd. Edition.

(d) The ownership must be correctly stated, see p. 189. 194.

80. *Indictment for burglary, alleging a breaking in, with intent, an actual felony committed, and a breaking out against the stat. 12 Ann. c. 7. (e).*

(Commencement as in *pr.* 75.) about the hour of twelve in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said C. D. in the said dwelling, then and there being, then and there feloniously and burglariously to steal, take and carry away; and then and there, with force and arms, one diamond necklace, of the value of forty pounds, of the goods and chattels of the said C. D. in the same dwelling-house, then and there being found; then and there feloniously and burglariously did steal, take, and carry away; and that the said A. B. so then and there being in the said dwelling house, with such intent as aforesaid, and so having committed the said felony as aforesaid, did then and there in the night time with force and arms, feloniously and burglariously, and against the form of the statute (f) in such case made and provided, break the said dwelling-house to get out of the same, against the peace, &c.

81. *Indictment for breaking a house in the day-time (no person being therein), and stealing goods of the value of five shillings (g).*

That A. B. late of, &c. labourer, on, &c. about the

(e) By the stat. Upon an indictment thus framed, the defendant may be found guilty of the burglary, if either the breaking in with intent in the night time be proved, or the entry with intent &c, and the breaking out in the night time, under the statute, or if the actual larciny, and either the breaking in or out in the night time be proved. So though the evidence does not warrant a con-

viction of the burglary, he may be convicted of stealing in the dwelling-house to the amount of 40 shillings, or of the simple larciny, see p. 40. plea of *autrefois acquit* and verdict, and Leach, 102.

(f) Since the stat. is declaratory, the averment does not seem to be necessary, but it is not improper, see p. 229.

(g) See 39. Eliz. c. 15. 1 Hale, 525.

four of eleven in the forenoon of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of C. D. there situate, feloniously did break and enter, (no person in the same dwelling-house then and there being,) and two pewter dishes, of the value of seven shillings (*here mention all the goods stolen,*) of the goods and chattels of the said C. D. in the same dwelling-house then and there being found, then and there feloniously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity.

82. *Indictment for arson (h).*

[*Commencement as in pr. 1.*] a certain house (i); of one

(h) Arson was felony at common law, 3 Ins. 66.; the *wilful* burning of dwelling-houses, or barns containing corn or grain, was ousted of clergy by stat. 23 H. 8. c. 1. & 25 H. 8.; but these stat. were repealed by the stat. 1 Ed. 6. c. 12. s. 10. For the evidence to support such an indictment, see Starkie on Evidence, vol. 2. tit. Arson.

The stat. 4 and 5 Ph. & M. c. 4. excludes from clergy those who shall maliciously command, hire, or counsel, any person or persons, wilfully to burn any dwelling-house, or any part thereof, or any barn then having corn or grain in the same. And this stat. has been holden, by necessary implication, to take away clergy from the principal offender. Poulter's case, 11 Rep. 35. Fost. 330. 2 Hale, 347. 1 Hale, 572. See also the stat.

22, 23 C. 2. c. 7. against burning in the night-time any ricks or stacks of corn, &c.; and the stat. 43 Eliz. c. 13.

The stat. 9 G. 1. c. 22. made perpetual by stat. 31 G. 2. c. 42. excludes from clergy any person who shall be lawfully convicted of setting fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood*.

By the stat. 9 G. 3. c. 29. s. 2. if any person shall wilfully or maliciously burn, or set fire to, any wind saw-mill, or other wind-mill, or any water-mill, or other mill, such person being lawfully convicted thereof, shall be adjudged guilty of felony, without benefit of clergy. The above form will suffice for an indictment under this act, if the word *windmill* be substituted for *house*.

The prosecution must be

* A common gaol is within this stat. See East's P. C. 1021. Donnevan's case. A prisoner might be indicted under this stat. for burning an outhouse, though it be part of the dwelling-house. North's case, East. P. C. 1021.

C. D. (k) there situate, feloniously (l), wilfully, and maliciously, did set fire to, and the same house then and there,

commenced within 18 months of the commission of the offence, sec. 4.

By the stat. 43 G. 3. c. 58. s. 1. if any person shall wilfully, maliciously, and unlawfully, set fire to any house, barn, granary, hop oast, malt-house, stable, coach-house, out-house, mill, warehouse, or shop, which shall then be in possession of the person or persons so setting fire to the same, or of any body corporate, with intent thereby to injure or defraud his majesty, or any of his majesty's subjects, or any body corporate, then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of, and being privy to such offence, shall be felons, and shall suffer death without benefit of clergy.

(i) Arson, at common law, is an offence against the *habitation*; but it might be committed, not only by burning the dwelling-house, but also the out-houses, which were parcel of the dwelling-house. 1 Hale, 570. 3 Ins. 67, 69. 1 Haw. c. 39. s. 1, 2. and it is not necessary to allege the burning of the *dwelling-house*, but only of the house simply. 1 Hale, 567. 570. 3 Ins. 67. 1 Haw. c. 39. s. 1. In Glandfield's case, East. P. C. 1034. it was holden, that *outhouses* generally was a sufficient description under 9 G. 1. c. 22. without shewing of what kind.

(k) The allegation of ownership is material, for it must appear, that the offence was committed against the property of another, and this allegation must be distinctly proved. Pedley's case, Leach, 277. Breeme's case, Leach, 261. Spalding's case, Leach, 258. Holmes's case, Cro. Car. 376. 3 Ins. 66. In the case of the Rickmans, East. P. C. 1034. the defendants were charged with the arson of a *certain house situate in the parish of Ellingham, &c.* and, after conviction, all the judges held that the conviction was wrong, because the indictment did not state the ownership. It appeared in that case, that the house belonged to the parish, and that they suffered one Thomas Early to live in it, but in whom the legal estate was vested was unknown; and the judges held, that it might have been laid to be the property of the overseers, or of persons unknown.

Where there is a doubt in which of several persons the property vests, it should be differently described in different counts, in order to obviate any objection on the score of variance.

If the occupation be merely permissive, as by a pauper of a house belonging to the parish, the property cannot be laid in him, vide supra, Rickman's case; and if such pauper, or a mere servant, burn the house

by such firing as aforesaid, feloniously, wilfully, and ma-

which he inhabits, even exclusively, he is guilty of arson. Gowen's case, East. P. C. 1027.

Otherwise, if the defendant has possession under a lease for years, Holmes's case, Cro. Car. 376. 3 Ins. 66. 1 Hale, 568. Breeme's case, Leach, 261. Pedley's case, Leach, 277. or as mortgagor, Spalding's case, Leach, 258. But it seems, that if the mere reversion be in the defendant, who has not possession, he may be guilty of the offence by burning the house. Harris's case, Fost. 113. East. P. C. 1023. In Spalding's, Breeme's, and Pedley's cases, it was holden, that, in respect of the property against which the offence was committed, the stat. 9 G. 1. c. 22. did not alter the common law. The offence is against the possession, and the house, &c. should be described as belonging to the person who has possession coupled with an interest; for if the occupation be *merely permissive*, the house ought not to be described as the occupier's. See Rickman's and Gowen's case, *supra*. In Glandfield's case, East. P. C. 1034. it appeared, that the outhouses burnt, including the brewhouse, were the property of Blanche Silk, widow, as also was the dwelling-house in which she lived with her son J. S.; that the son alone occupied the outhouses, with the exception of the brewhouse, on his own account, but without any particular agreement with his mother; that she repaired the dwelling-

house and outhouses, and that they jointly contributed to the ingredients for the beer, which was brewed in the brewhouse, and which was used in the family. Mr. J. Heath held, that the brewhouse ought to be laid as in their joint occupation, but the other outhouses as in the occupation of the son; and upon the indictment so drawn, the prisoner was convicted and executed.

If a man, by setting fire to his own house, endanger others which are contiguous, he may be indicted for the misdemeanor, and it is unnecessary in such case to aver an intention to burn the contiguous houses. 1 Hale, 568. Cro. Car. 877. Scholfield's case, Cald. 397. But if the defendant set fire to his own house with intent to defraud the insurers, and the house of his neighbour be burnt in consequence, the offence will amount to arson. Per Grose, J. in giving judgment in Probert's case, East. P. C. 1630.

And in Isaac's case, East. P. C. 1031. where the offence committed under such circumstances, was laid as a misdemeanor, Buller, J. directed an acquittal on the ground, that the misdemeanor merged in the felony. And if the defendant set fire to his own house, with intent to burn his neighbour's house, and the latter be burnt in consequence, the offence is as much arson, as if the defendant had immediately set fire to his neighbour's house; therefore if A. intending to

liciously did burn and (m) consume, against the form of the statute, &c. and against the peace, &c.

83. *For burning a cotton mill (n).*

Lancashire, to wit, &c. that James Smith, &c. together with divers other ill-disposed persons, whose names are to the said jurors at present unknown, heretofore, to wit, on the 24th day of April, in the 52d, &c. Geo. 3. &c. with force and arms, at Westhoughton, in the county palatine of Lancaster, did feloniously, wilfully, maliciously, and unlawfully, set fire to and burn a *certain cotton mill, warehouse, and shop*, situate at Westhoughton aforesaid, in the county palatine aforesaid, and then being in the possession of one Thomas Wroe, and one James Duncuft, with intent thereby to injure the said Thomas Wroe and James Duncuft, (they the said Thomas Wroe and James Duncuft, at the time of committing the felony aforesaid, being liege subjects of our said lord the king,) against the form of the statute, &c. and against the peace, &c. (2d count.) And the jurors, &c. that the said James Smith, &c. and the other ill-disposed persons, whose names are to the said jurors unknown, afterwards, to wit, on the same day and year aforesaid; with force and arms, at Westhoughton aforesaid, in the county aforesaid, did feloniously, wil-

burn B.'s house, set fire to his own, and B.'s is burnt in consequence, the indictment may charge A. directly with the wilful and malicious burning of B.'s house. 1 Hale, 569. East. P. C. 1034. And now see the above stat. 43 G. 3. c. 58. s. 1.

(l) The words *maliciously* and *wilfully*, are descriptive of the offence as ousted of clergy by the stat. 4 and 5 Ph. and M. c. 4. but they are no part of the description under the stat. 9 G. 1. c. 22. though under the latter statute, to oust the offender of clergy, it must appear that the act was *wilful*

and *malicious*; and it seems to be safer so to aver it. See 1 Hale, 567. 569. 3 Ins. 67. East. P. C. 1033. 1021. Minton's case.

(m) This averment, under the stat. 9 G. 1. is usual, but does not seem to be essential, since the offence is complete by *setting the house on fire*.

(n) This form of indictment was used against several prisoners, who were tried at a special session at Lancaster, May, 1812; it was objected, that a cotton mill was not within the meaning of the statute, but the objection was overruled:

fully, maliciously, and unlawfully, set fire to and burn a certain mill, to wit, a cotton mill, situate at Westhoughton aforesaid, in the county aforesaid) and then being in the possession of the said Thomas Wroe, &c. (as in the first count.) 3d count, charges the prisoner with setting fire to a certain warehouse, &c.; 4th count with setting fire to a certain shop, &c.

84. For burning his own house, with intent to defraud the insurers (o).

On, &c. with force and arms, at, &c. feloniously, wilfully, maliciously, and unlawfully, did set fire to a certain house, being in the possession of him the said A. B. with intent thereby to injure and defraud the *London Assurance of houses (p) or goods from fire*, (then and there being a body corporate) against the form of the statute, &c. and against the peace, &c.

85. Indictment for setting fire to Portsmouth dock-yard, and destroying naval stores.

(Commencement as in pr. 1.) twenty tons weight of hemp, of the value of one hundred pounds, ten cable ropes, each thereof being in length one hundred fathoms, and in circumference three inches, and of the value of eighty pounds, and six tons weight of cordage, of the value of two hundred pounds, the said hemp, cable ropes, and cordage, then and there being naval stores of our said lord the king, and then placed and deposited in a certain building in the dock-yard of our said lord the king, there situate, called the rope-house, feloniously, wilfully, and maliciously, did set on fire and burn, and cause and procure to be set on fire and burnt, against the form of the statute, &c. and against the peace, &c. (2d count, commencement as in pr. 5.) a certain building erected in the dock-yard of our said lord the king there situate, called the rope-house, feloniously, wilfully, and maliciously, did set on fire, and cause and procure to be set on fire, against the form of the statute, &c. and against the peace, &c.

(o) Under the stat. 43 G. 3. c. 58. s. 1. supra, 417, n. (l).
see Gillson's case, 1 Taunt. 95.

(p) According to the fact.

(3d count,) a certain building of our said lord the king there situate, in which great quantities of naval stores, that is to say, twenty tons weight of hemp, ten cable ropes, and six tons weight of cordage, of our said lord the king, were then placed and deposited, feloniously, wilfully, and maliciously did set on fire, and cause and procure to be set on fire, against the form of the statute, &c. (q), and against the peace, &c.

86. *Indictment for setting fire to a stack of hay.*

A certain stack of hay, of and belonging to one T. P. feloniously, unlawfully, wilfully, and maliciously, did set fire to, against the form of the statute (r), &c. and against the peace, &c.

87. *Indictment, at common law, for setting fire to a place of confinement in a borough.*

(Commencement as in pr. 1.) a certain building there situate and being, called ———, (the same then and there being the prison of the borough of M. in the county aforesaid), then and there wickedly, wilfully, maliciously, and injuriously, did set fire to, and the same building, called ———, then and there unlawfully, wickedly, and injuriously, did, by such firing, burn, consume, and destroy, against the peace, &c. (2d count, commencement as in pr. 7.) a certain building there situate and being, called ———, then and there wickedly, wilfully, maliciously, and injuriously did set fire to, and the same building, called ———, then and there wickedly and injuriously did, by such firing, burn, consume, and destroy, &c.

88. *Indictment for a forcible entry and detainer at common law.*

That A. B. late of, &c. yeoman, and C. D. late of the same, labourer, together with divers other evil-disposed persons and disturbers of the peace of our said lord the king, to the number of six and more, (whose names to the jurors aforesaid are as yet unknown,) on, &c. with

(q) 12 G. 3. c. 24,

(r) 9 G. 1. c. 22. see pr. 417. n. (H).

force and arms, *and with a strong hand* (s), unlawfully, violently, forcibly, and injuriously, did enter (t), into (state the premises according to the (u) fact,) * then and there being in the peaceable possession of one E. F. and situate and being in the parish aforesaid, in the county aforesaid; and that the said A. B. and C. D. together with the said other evil-disposed persons, then and there, with force and arms, *and with a strong hand* (x), unlawfully, violently, forcibly, and injuriously, did expel, amove, and put out the said E. F. from the possession of the said premises, with the appurtenances, and the said E. F. so as aforesaid expelled, amoved, and put out from the possession of the same, with force and arms, *and with a strong hand*, unlawfully, violently, forcibly, and injuriously, have kept out from the day and year aforesaid, until the taking of this inquisition, and still do keep out, and other wrongs to the said E. F. then and there did, to the great damage of the said E. F. and against the peace, &c.

89. For a forcible entry into a freehold (y).

(As in pr. 88. to the *) then (z) and there being, the freehold of E. F. and then being in the tenure and occu-

(s) See 8 T. R. 357. *R. v. Wilson et al.* 6 Mod. 96. *R. v. Dyer.*

(t) An indictment under the statutes for a detainer must shew an *entry*. 1 Haw. c. 64. s. 40. Roll. Ab. 89. But under the stat. 8 H. 6. it need not be alleged, that the entry was *forcible*, when a forcible detainer alone is complained of.

(u) The description of the situation is essential, and a variance would be fatal, see p. 176. and appendix, notes, 176. If the indictment be framed upon one of the stat. for the purpose of obtaining restitution, the premises must be described, with certainty, in order to enable the justices and she-

riff to restore the possession; and, therefore, the same degree of certainty is requisite as in a declaration in ejectment. See 1 Haw. c. 64. s. 37.

(x) The words with force and arms are implied in the words *with a strong hand*. 1 Haw. c. 64, s. 44.

(y) *R. v. Edwards et ux.* Trem. P. C. 192. see the stat. p. 425.

(z) An indictment under the stat. 8 H. 6. c. 9. should shew, that the place was the *freehold* of the party grieved, at the time of the force, and, therefore, it is not sufficient to say, "being the freehold of E. F." without the word *then*, which shews it to have been his free-

possession of one (a) G. H. and did then and there, with force and arms, *unlawfully*, with a strong hand, and *without judgment recovered* (b), *disseise* (c) the said E. F. and *expel* and eject the said G. H. from his possession of the same, and with force and arms unlawfully, and *with a strong hand*, from the day and year aforesaid, until the taking of the inquisition, have kept out, and still (d) do keep out the said E. F. so disseised as aforesaid, and the said G. H. so ejected and expelled as aforesaid from the said premises, with the appurtenances, against the form of the *statute* (e), &c. and against the peace, &c.

hold at the time of the force, see p. 59. Baude's case. Cro. J. 41. 214. Dy. 69. 1 Haw. c. 64. s. 38. It seems to be unnecessary to aver expressly, that the party grieved was seized of the freehold, 1 Haw. c. 64. s. 38. Trem. P. C. 192. And it is unnecessary to shew what particular estate the party had, or by what title he held it, for the injury is to the possession. 1b.

It would be repugnant to allege *then and yet* being the freehold, since it would imply, that the party was in possession at the time of finding the indictment, and therefore would be inconsistent with the allegation, that the wrong-doer still keeps the party out, 1 Haw. c. 64. s. 39.; and, at all events, no restitution could be awarded, since it would appear that the party complaining had the freehold at the time of the inquisition. 1b.

(a) It has been holden, that an indictment on the stat. 5 and 15 R. 2. need not shew whose the freehold was at the time of the force, but that it should shew that the entry was made on the possession of some person who had some estate in

the premises, either as a freeholder or lessee. 1 Haw. c. 64. s. 38. Yel. 165.

(b) In the original it is *sin judicio*.

(c) The word *disseise* is sufficient without either of the words *unlawfully* or *expel*, for the word implies an unlawful expulsion. Noy. 125. Cro. J. 32. Cro. Eliz. 86.

(d) To entitle the party grieved to restitution, it must be shewn that the wrong-doer ousted the party grieved, and that the possession of the wrong-doer *continued* at the time of finding the indictment; for it would be absurd to award restitution to one who had no possession, and in vain to award it to one who does not appear to have lost it. Salk. 260. Str. 474. 1 Haw. c. 64. s. 41.

(e) See the Prec. Trem. 192. and *supra*, p. 230.

By stat. 5. Rich. 2. ch. 8. the king defendeth, that none, from henceforth, make "any entry into any lands and tenements, but in case where entry is given by the law; and in such case, not with strong hand, nor with multitude of people, but only in peaceable

90. For a forcible entry on tenant for years, under the stat. 21 Jac. 1. c. 15 (f).

The form is the same as in pr. 88. introducing after the words in the peaceable possession of one E. F. the words

and easy manner. And if any man, from henceforth, do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."

By stat. 15 Rich. 2. c. 2. it is enacted, that the said statute, and all others made against forcible entries, &c. shall be fully executed; and further, that at all times when such forcible entries shall be made, and complaint thereof cometh to the justices of the peace*, or to any of them, the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next gaol, there to abide, convict, by the record of the same justices or justice, until they have made fine and ransom to the king. And that all the people of the county, as well the sheriffs as others, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the king. And in the same manner it shall be done of them

that make such forcible entries into benefices, or offices of holy church.

By stat. 8 Hen. 6. c. 9. when forcible entry is made into premises, which are afterwards held forcibly, justices of the peace are to inquire of the force, by a jury summoned by the sheriff; and cause the tenements to be seized and restored, &c.

By sec. 2. all former statutes concerning forcible entry are confirmed.

By sec. 6. of the same stat. the party grieved shall have an action of trespass against the offender for treble damages, and the defendant shall moreover make fine and ransom to the king.

(f) In order, however, that parties grieved, having a less estate than that of freehold, should be relieved by restitution.

It is by stat. 21 Jac. 1. c. 15, enacted, "that such judges, justices, or justice of the peace, as by reason of any act or acts of parliament now in force, are authorised and enabled upon inquiry, to give restitution of possession unto tenants, of any estate of freehold, of their lands or tenements, which shall be entered upon with force,

* For the proceedings upon application to one or more justices, see Burn's Jus. 383. edit. 21.

for a certain term (g) of years then to come, and then and yet unexpired; *then proceed as in pr. 88. concluding as in pr. 85, against the form of the statute, &c.*

91. *Indictment against three for a riot before the house of A. B., and shooting off a loaded gun through his window, and threatening to shoot him. (h).*

(Commencement as in pr. 1.) did unlawfully, riotously, and tumultuously assemble and gather together to disturb the peace of our said lord the king, and being so assembled and gathered together, did then and there unlawfully, riotously, tumultuously, violently, and outrageously, make a great noise, disturbance, and affray, near to and about the dwelling-house of one J. S. there situate, and did unlawfully, &c. stay and continue near to and about the said dwelling-house of the said J. S. making such their noise,

or from them with-holden by force, shall, by reason of this present act, have the like and the same authority and ability, from henceforth, (upon indictment of such forcible entries, or forcible with-holdings before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights-service, tenants by elegit, statute merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

By stat. 31 Eliz. c. 11. no restitution upon any indictment of forcible entry, or holding with force, shall be made to any person, if the person so indicted hath had the occupation, or been in quiet possession, for the space of three whole years together, next before the day of such indictment

so found, and his estate therein not ended; which the party indicted may allege for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same: and if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions.

(g) In order to bring the case within the stat. it must be alleged, that the party was possessed of a term for years, that he was possessed is not of itself sufficient. 1 Haw. c. 64. s. 38. 1 Vent. 306. 1 Sid. 102. 1 Mod. 73.

(h) See 3 Burr. 1701, 2, 3. 4 Went. 309.

disturbance, and affray, for a long space of time, to wit, for the space of two hours, and during that time, there did unlawfully, &c. shoot off a certain gun loaded with gunpowder and leaden shot, at and against the said dwelling-house and through certain windows, parcel thereof, and thereby then and there not only greatly terrified and alarmed the said J. S. and his family, and disturbed and disquieted them in the peaceable and quiet possession, use, and occupation of the said dwelling-house, but also then and there broke to pieces, shattered, and damaged the glass, to wit, twenty panes of glass of a large value, then and there affixed, and belonging to the said windows, and then and there with loud and horrid oaths and imprecations, unlawfully, &c. menaced and threatened the said J. S. to shoot him through the body, and other wrongs to the said J. S. then and there unlawfully, &c. did to the great damage of him the said J. S. and against the peace of our lord the now king, his crown, and dignity.

LARCINY AND ROBBERY.

92. Indictment for grand larciny, in stealing the property of different persons.

(Commencement as in *pr.* 1 (a).) one (b) silver watch, of the value (b) of forty shillings, of the goods and chattels of (b) E. F. two hats, of the value of twenty shillings,

(a) As to the venue, when goods stolen elsewhere are brought into the body of a county, see p. 10. 13 Geo. 3. c. 31. s. 4. and 44 G. 3. c. 92. and now by the stat. 59 G. 3. c. 27.

In any indictment for any felony committed on board any barge, boat, trow, or other vessel whatever, employed or used in carrying or conveying goods, wares, or merchandize, or in which any such goods, wares, or merchandize, shall be in or

upon any canal, navigable river, or inland navigation, in any part of the united Kingdom of Great Britain and Ireland, it shall be sufficient to allege, that such felony was committed within any county or city through any part whereof such boat, barge, trow, or other vessel shall have passed in the course of the voyage or journey during which such felony shall have been committed, and in cases wherein the sides or banks of any navigable river, canal,

and two (c) waistcoats, of the value of six shillings*, of the

or inland navigation, or the centre thereof, shall constitute the boundary of any two counties or cities, it shall be sufficient to allege that such felony was committed in either of the said counties or cities through which or any part thereof such boat, barge, trow, or other vessel, shall have passed in the course of the voyage or journey during which such felony shall have been committed, and every such felony shall and may be inquired of, tried, and determined, in the county or city within which the same felony shall be so alleged to have been committed, and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death and other pains, penalties, and forfeitures, as such person or persons convicted of such felony would have been subject and liable to in case such felony had been inquired of, tried, and determined, in the county in which the same felony was actually committed.

And by the stat. 59 G. 3. c. 96. in any indictment for any felony committed on any stage-coach, stage-waggon, stage-cart, or other such carriage whatever, employed or used in carrying or conveying goods, wares, and merchandize, or in which any such goods, wares, or merchandize, shall be in or upon any highway in any part of the united kingdom of Great

Britain and Ireland, it shall be sufficient to allege that such felony was committed within any county or city, through any part whereof such stage-coach, stage-waggon, stage-cart, or other such carriage shall have passed in the course of the journey during which such felony shall have been committed, and in all cases where any highway shall form the boundary of any two counties, it shall be sufficient to allege, that such felony committed as aforesaid, was committed in either of the said counties through which or any part whereof such stage-coach, stage-waggon, stage-cart, or other such carriage shall have passed in the course of the journey during which such felony shall have been committed, and every such felony shall and may be inquired of, tried, and determined, in the county or city within which the same felony shall be so alleged to have been committed.

(b) As to the description of the property stolen, its value, and ownership, see chap. x. p. 192. The owner of goods stolen is not, in strictness, entitled to the restitution of any which are not specified in the indictment. East's P. C. 288. If a thief sell the goods, the prosecutor is entitled to the money. Hanberrie's case, Cro. Eliz. 661. 1 Hale, 542.

(c) Although, in general, the value of each different individual article stolen should be specified, p. 197. 2 Hale, 183. yet where several articles of

goods and chattels of (d) one G. H. then and there being found, *feloniously* did *steal*, *take*, and *carry away* (e); against the peace, &c.

93. *Indictment for stealing goods, money, and notes.*

One watch, of the value of forty shillings, ten pieces of the current gold coin of the realm, called guineas, of the value of ten pounds and ten shillings, twenty pieces of the current silver coin of the realm, called half-crowns, of the value of two pounds and ten shillings, ten pieces of the current silver coin of the realm, called shillings, of the value of ten shillings, ten pieces of the current silver coin of the realm, called sixpences, of the value of five shillings, sixty pieces of the current copper coin of the realm, called pennies, of the value of five shillings, and sixty pieces of the current copper coin of the realm, called half-pennies, of the value of two shillings and sixpence, and the sum of two pounds and ten shillings in monies numbered, and ten bank notes for the payment of money, to wit, for the payment of one pound each, and respectively, and of the value of one pound each, and respectively, and one bill of exchange for the payment of money, to wit, for the payment of twenty-seven pounds and sixteen shillings of lawful money, and of the value of twenty-seven pounds and

property of the same nature and kind, are stolen at the same time, as several sheep or handkerchiefs, it is the common practice to allege their value cumulatively, as ten handkerchiefs, of the value of 20 shillings. And unless the defendant be convicted of stealing part only, no uncertainty can arise: but if the jury find that he stole one only, then it may be doubtful, whether the offence be grand or petit larceny, since they were not alleged to be of the value of two shillings each, but in such case the difficulty might perhaps be obviated by finding the value specially.

(d) Where the felonies are

completely distinct, they ought not to be joined in the same indictment, see p. 40.; but where the transaction is the same, as where the property of different persons is taken at the same time, there seems to be no objection to the joinder.

(e) These words are essential, see p. 78. and, in an indictment of this nature, it is unnecessary further to specify the means of gaining possession of the property. See p. 93. Leach, 273. 305. 730.

An indictment for petit larceny differs from one for grand larceny in no other respect than in laying the value at one shilling or under.

sixteen shillings of lawful money of the goods and chattels, monies, and property, of E. F. then and there found and being, the said sums of money payable and secured by the said bank notes and bill of exchange, being then and there wholly unpaid, and unsatisfied to him the said E. F., the proprietor thereof, feloniously did steal, take, and carry away, against the form of the statute, in such case made and provided, and against the peace of our said lord the king, his crown, and dignity.

94. *Indictment under the stat. 21 H. 8. c. 2 (f). against a servant for feloniously embezzling his master's goods, delivered to him to keep for the master's use.*

That A. B. late of, &c. labourer, on &c. then being a servant of and to one C. D. and not an apprentice (g), or a person within the age of eighteen years (g), he the said C. D. did then and there, upon confidence and trust, deliver unto the said A. B. his said servant, one silver watch, of the value of five pounds, of the goods and chattels of him the said C. D. safely to keep the same to the use of him the said C. D. and that he the said A. B. after the said delivery and whilst he was such servant (h) as aforesaid, so

(f) By this stat. servants having caskets, jewels, money, goods, or chattels, delivered to them by their masters or mistresses, safely to be kept for the use of their said masters or mistresses, and after such delivery withdrawing themselves from their masters or mistresses, and going away with the said caskets, &c. or any part thereof, to the intent to steal the same and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence in him or them put by his or their said master or mistresses; or else being in the service of his said master or mistress, without assent or commandment of his

master or mistress, if he embezzle the said caskets, &c. or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, (if the said caskets, &c. be of the value of forty shillings, or above,) then the same false, fraudulent, and untrue act or misdemeanor shall be adjudged felony; and he or they so offending shall be punished as other felons are punished.

(g) Unnecessary, the exceptions are not in the *purview*, 162.

(h) He must be servant, both at the time of the delivery and running away. Dalt. c. 58. Dyer, 5. 1 Haw. c. 33. s. 12. East. P. C. 562.

wit, on the — day of —, with force and arms, at the parish aforesaid, in the county aforesaid, did feloniously withdraw himself from the said C. D. his said master, and feloniously did go away with the same silver watch above mentioned, to the intent to steal the same, and defraud the said C. D. his said master, thereof, contrary to the trust and confidence in him the said A. B. put by the said C. D. his said master, against the form of the statute, &c. and against the peace, &c. (*Add a count for a common larciny. as in pr. 93.*)

95. Indictment against a clerk for embezzlement, under the stat. 39 G. 3. c. 85 (i).

Lancashire, &c. that J. J., late of Liverpool, in the county of Lancaster, labourer, on, &c. at, &c. was clerk to the trustees of the Liverpool docks, and the said J. J. being such clerk as aforesaid, did then and there, by vir-

(i) By 39 Geo. 3. c. 85. it is enacted and *declared*, that if any servant or clerk, or any person employed for the purpose, in the capacity of a servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall by virtue of such employment receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name, or on the account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to, or taken into the possession of such ser-

vant, clerk, or other person so employed, although such money, goods, bond, bill, note, banker's draft, or other valuable security, was or were no otherwise received into the possession of his or their servant, clerk, or other person so employed: and every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas, as his majesty, by and with the advice of his privy council, shall appoint, for any term not exceeding fourteen years, in the discretion of the court before whom such offender shall be convicted or adjudged. By the stat. 52 G. 3. c. 63. it is felony in brokers, bankers, attornies, and others, to embezzle securities deposited with them for safe custody or special purposes.

tue of his said employment as such clerk as aforesaid, receive and take into his possession, for and on account of the said trustees of the Liverpool docks, divers, to wit, nine bank notes (*k*), for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money of Great Britain, and of the value of 9*l.* of like lawful money; and the said J. J. having so received and taken into his possession the said bank notes for and on account of his said employers, the said trustees of the Liverpool docks, he the said J. J. afterwards, to wit, on the same day and year aforesaid, with force and arms, at &c. fraudulently and feloniously did embezzle (*l*) and secrete the same; and so the jurors aforesaid, upon their oath aforesaid, do say, that he the said J. J. on the said — day of —, in the year aforesaid, with force and arms, at, &c. *in manner and form aforesaid*, feloniously did steal, take, and carry away the said bank notes from his said employers the said trustees of the Liverpool docks; the said bank

(*k*) In Milnes's case, East. P. C. 602. the prisoner was charged with stealing one promissory note for the payment of one guinea, and also one other promissory note for the payment of five guineas, which said notes were the property of J. M. and were due and unsatisfied; and this was holden to be a sufficient description under the stat. 2 G. 2. and in the case of the *King v. Johnson*; where the above indictment was used; the case of the *King v. Simphin* was cited, which had been tried before Mr. J. Chambre, who held that a general description was sufficient. See *R. v. Campbell*, Leach, 642. where the property was described as one promissory note called a bank note, of the value of 25 pounds, the said note, at the time of committing the felony afore-

said, being the property of the said C. M. A. and the said sum of 25 pounds payable and secured by the said note, being then due and unsatisfied to the said C. M. A.; a similar description was used in Nicholson's case, Leach, 678. See *R. v. Johnson*, 4 M. & S. 515.

(*l*) The act is declaratory of the common law, consequently, an indictment framed upon it must contain all that is essential to an indictment for larceny at common law. *R. v. M'Gregor*, 3 Bos. & Pul. 196: and, therefore, it appears to be necessary to superadd to the description of a larceny at common law, the descriptive words of the statute. But the indictment must be specially framed under this stat. although it is declaratory. *R. v. Jones*, E. P. C. 576.

notes being then and there the property of the said trustees of the Liverpool docks, on whose account the same were received by and taken into the possession of him the said J. J. being such clerk as aforesaid, and the several sums of money payable and secured thereby being then, to wit, at the time of committing the felony aforesaid, to wit, at, &c. due and unsatisfied to the said trustees of the Liverpool docks, the proprietors thereof, against the form of the statute, &c. and against the peace, &c.

2nd count charges the like felony by the said J. J. *being employed in the capacity of clerk* to the said trustees of the Liverpool docks.

3rd count charges the like felony by the said J. J. *being a servant* to the said trustees of the Liverpool docks.

4th count charges the embezzling of the property of H. C. to whom the said J. J. was clerk.

5th count charges the embezzling of the property of H. C. he the said J. J. being employed in the capacity of a clerk to the said H. C.

6th count states the embezzlement of the property of H. C. he the said J. J. *being a servant* to the said H. C.

7th count. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said J. J. afterwards, to wit, on the same day and year aforesaid, with force and arms, at Liverpool aforesaid, in the county aforesaid, feloniously did steal, take, and carry away divers, to wit, nine other bank notes for the payment of money, that is to say, for the payment of nine pounds and of the value of nine pounds, the said last-mentioned bank notes, at the time of committing the felony last aforesaid, being the property of the said H. C. and the several sums of money payable and secured thereby, being then due and unsatisfied to the said H. C. the proprietor thereof, against the form of the statute, &c. and against the peace (m), &c.

(m) The prisoner was convicted upon this indictment, coram Le Blanc, J. at the spring assizes for Lancashire, 1814. Two objections were made in arrest of judgment: 1st. That the prisoner was not charged with having embezzled

any one bank-note of a specified amount and value. 2dly. That the joinder of a felony at common law with a felony under the statute was improper. The court was of opinion, upon the first point, that as the stat. particularly mention-

96. Indictment for stealing goods let by contract to be used with a lodging (n).

(*As in pr. 87. to the *.*) Of the goods and chattels of one (o) E. F. (the (p) same goods and chattels being in a certain lodging-room in the dwelling house of the said E. F. there situate, let by contract by the said E. F. to

ed bills and notes; it was sufficient to state them as bank-notes for the payment of money, without averring the amount and the denomination of each; that, as to the alleged misjoinder, the answer was, that both the offences were felonies, and both of them larcinies; and that, though it might have been more consistent, if the embezzling act had enacted, that the offence should be considered grand larceny, and had authorized the court to direct the offender to be transported, yet that the proper judgment might be given, if the offender should be convicted on any one count; that where the offences are of the same nature, their joinder cannot be taken advantage of in arrest of judgment, and that in the principal case the offences were of the same nature, and the prisoner equally entitled to his challenges; and that upon a case which was tried at the Old Bailey, where the prisoner was indicted for uttering a number of forged receipts, the judges held that it was always a matter of discretion in the court, where different offences of the same nature were charged in the same indict-

ment, to put the prosecutor to his election, but not a ground for arresting the judgment, see p. 36. *R. v. Johnson*, M. & S.

(n) By stat. 3 & 4 W. & M. c. 9. s. 5. if any person or persons shall take away, with intent to steal, &c. any chattel, bedding, or furniture, which by contract or agreement they are to use, or shall be let to them in lodgings, such taking, &c. shall be adjudged larceny and felony.

(o) The name of the owner must be correctly stated, p. 177. *R. v. Pope*, Leach, 617.

In *Palmer's case*, 2 Leach, 782. East. P. C. 586. it was holden that the statute did not apply to the case of a defendant who hired a *whole house* ready furnished; and some of the judges were of opinion that the statute did not apply to a case where the defendant contracted to make good what should be missing or injured.

(p) In *Burnell's case*, Leach, 668. East. P. C. 587. it was objected to an indictment drawn in this form, that it did not state that the goods were let *at the time* they were stolen, but all the judges held that the indictment was sufficient. See Leach, 377. 668. 782.

the said A. B. and to be used by the said A. B. with the lodging aforesaid,) then and there being found, feloniously did steal, take, and carry away, against the form of the statute, &c. and against the peace, &c.

97. Indictment for stealing a letter, containing bills of exchange, out of a bag sent by the post (q).

(Commencement as in pr. 1.) Feloniously (r) did steal;

(q) By 7. Geo. 3. c. 50. s. 2. it is enacted, that if any person or persons whatsoever shall rob any mail or mails, in which letters are sent or conveyed by the post, of any letter or letters, packet or packets, bag or mail of letters; or shall steal or take from or out of any such mail or mails, or from or out of any bag or bags of letters, sent or conveyed by the post, or from or out of any post office*, or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or letters, packet or packets; although such robbery, stealing, or taking, shall not appear, or be proved, to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling-house, or any coach-house, stable, barn, or any out-house belonging to any dwelling-house; and although it should not appear that any person or persons were put in fear by such robbery, stealing, or

taking, yet such offender or offenders, being thereof convicted as aforesaid, shall nevertheless respectively be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

By the stat. 52 G. 3. c. 143. s. 3. if any person shall steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of Great Britain, or from or out of any post-office, or house, or place, for the receipt or delivery of letters, or packets, or bags, or mails of letters, sent or to be sent by such post, any letter, or packet, or bag, or mail of letters, sent or to be sent by such post, or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and such offence shall and may be

* It was holden in Pearce's case, East. P. C. 603. that the defendant who procured the bags of letters from the post office to be let down to him by a string, pretending that he was the mail guard, was within this statute.

In Howatt's case, East. P. C. 604. it was holden that a letter carrier who fraudulently obtained possession of letters at the office, intending to deliver them to the owners, but to embezzle the postage, was not within the act.

take, *and carry away* (*s*) one letter (*t*) from and out of a certain bag of letters, then and there sent by the post, to wit, by the post from C. in the county of D. to E. against the form of the statute, &c. and against the peace, &c. (*In a second count describe the property as*) one packet (the said packet being then and there a letter, containing sundry bills of exchange) from and out of a certain other bag of letters, then and there sent by the post, to wit, by the post from C. aforesaid, in the said county of D. to E. aforesaid.) (*In a third count de-*

inquired of, tried, and determined, either in the county where the offence shall be committed, or where the party shall be apprehended.

By sec. 2. If any person *employed by the post office*, shall steal from any letter, &c. which shall have come into his hands, any note, &c. he shall suffer death, without benefit, &c. By sec. 4. the like penalty is to be inflicted upon any person who shall counsel any person employed by the post-office, to commit such offence, or who shall receive such property, knowing the same to have been stolen out of such letter, &c. and such persons may be tried and attainted, as well before as after the trial of the principal felon, and whether he be amenable to justice or not.

(*r*) The indictment must be laid in the county where the mail was actually taken, and therefore, where upon the evidence it appeared that the taking of the letters from the mail was committed in one of the counties A. and B. through which the mail passed, and that he had them in possession in the county C. where he left

the mail-coach; it was holden that the evidence did not support an indictment for the offence in the county C. Thomas's case, East. P. C. 607.

(*s*) These words, which are added as descriptive of a larciny at common law, are not always inserted in indictments under this act, and are not used in the statute. See C. C. A. 286. East. P. C. 576.

(*t*) It seems to be sufficient to describe it generally as a letter, but if the direction of the letter be known, it would be proper, in one count, to describe the letter as directed, to, &c. In Dawson's case, the letter was described as "to be delivered to persons using in trade the name and firm of Messrs. B. Nott," and though they generally subscribed themselves as B. Nott, without Messrs. yet, as this word was frequently added to their address, in the direction of letters and other papers received on business, it was holden that there was no variance. East. P. C. 605. The secreting a letter containing the paid notes of a country banker is within the statute. *R. v. Ranson*, Leach, 1090. 4th ed.

scribe the property as) one packet from and out of a certain other bag of letters, then and there sent by the post, that is to say, by the post from C. aforesaid, in the said county of D. to E. aforesaid, *and conclude as before* (u).

98. *For a mail robbery* (x).

The jurors, &c. tha .M. late of M. in the county palatine of Lancaster, labourer, otherwise called George Moors, late of the same place, labourer, heretofore, to wit, on, &c. with force and arms, at, &c. feloniously did rob (y) a certain mail in which letters were then and there sent and conveyed by the post, to wit, by the post from Altrincham, in the county palatine of chester, for and towards Manchester, in the county palatine of Lancaster, of one bag of letters, against the form of the statute, &c. and against the peace, &c.

(2nd count.) And the jurors, &c. that the said G. M. &c. afterwards, to wit, on the 21st day of January, in the 51st year of the reign aforesaid, with force and arms, at M. in the county palatine of Lancaster, feloniously did steal and take from and out of a certain other mail in which letters were then and there sent and conveyed by the post, to wit, by the post from Altrincham, in the county palatine of Chester, for and towards Manchester, in the county palatine of Lancaster, divers, to wit, two letters sent by the post, to wit, by the post from Altrincham, in the county of Chester, that is to say, one letter for and to be delivered to certain persons at Newark, in Nottinghamshire, that is to say, one William Caparn and one Walter Hare, and one other letter, against the form of the statute, &c. and against the peace, &c.

(3rd count.) And the jurors, &c. that the said G. M. &c. afterwards, to wit, on the 21st day of January, in the 51st, &c. with force and arms, at Manchester, in the county palatine of Lancaster, feloniously did steal and take, from

(u) For evidence under this stat. see Robinson's case, 2 Starkie's C. 485. and Law of Evidence, vol. 2. tit. Larciny.

(x) The defendant was convicted and received sentence of death, but was reprieved on

condition of transportation for life.

(y) See last pr. note (s), and qu. whether it would not be proper to add words as descriptive of a robbery or larciny at common law.

and out of a certain other mail in which letters and packets were then and there sent and conveyed by the post, to wit, by the post from Altrincham, in the county palatine of Chester, for and towards Manchester, in the county palatine of Lancaster, divers, to wit, two packets sent by the post, to wit, by the post from Altrincham, in the county palatine of Chester, that is to say, one packet for and to be delivered to certain persons at Newark, in Nottinghamshire, to wit, the said William Caparn and Walter Hare, and one other packet, against the form of the statute, &c. (4th count.) And the jurors, &c. that the said G. M., &c. afterwards, to wit, on, &c. with force and arms, at M. in the county palatine of Lancaster, feloniously did steal and take from and out of a certain bag of letters, then and there sent and conveyed by the post, to wit, by the post from Altrincham, in the county palatine of Chester, for and towards M. in the county palatine of Lancaster, divers, to wit, two other letters sent by the post, to wit, by the post from Altrincham, in the county palatine of Chester, that is to say, one letter for and to be delivered to certain persons at Newark, in Nottinghamshire, that is to say, the said William Caparn and Walter Hare, and one other letter, against the form of the statute, &c.

(5th count.) And the jurors, &c. that the said G. M. &c. on, &c. with force and arms at M. in the county palatine of Lancaster, feloniously did steal and take, from and out of a certain bag of letters then and there sent and conveyed by the post, to wit, by the post from Altrincham, in the county palatine of Chester, for and towards Manchester, in the county palatine of Lancaster, divers, to wit, two other packets sent by the post, to wit, by the post from Altrincham, in the county palatine of Chester, that is to say, one packet for and to be delivered to certain persons at Newark, in Nottinghamshire, that is to say, the said William Caparn and Walter Hare, and one other packet, against the form of the statute, &c. and against the peace, &c.

99. *Indictment under the stat. 5 G. 3. c. 14. s. 6 (z). for stealing conies from grounds used for the breeding and keeping of conies.*

(Commencement as in pr. 1.)

Wilfully and wrongfully, in the night-time of the said day, that is to say, about the hour of ten in the night of the said day, did enter into a warren there situate, and then and there lawfully used for the breeding and keeping of conies, and then occupied by M. N. and did then and there wilfully and wrongfully take, in the night-time of the said day, that is to say, about the hour of ten in the night of the said day, thirty conies, of the price of 20 shillings, against the will of the said M. N. then and there being the occupier of the said warren, so as aforesaid then and there lawfully used for the breeding and keeping of conies, to the great damage of the said M. N. against the form, &c. and against the peace, &c.

(It may be proper to add a count for killing the conies, the language of which will be nearly the same with that of the first count.)

(z) The stat. enacts, that if any person or persons shall wilfully and wrongfully, in the night-time, enter into any warren or grounds lawfully used or kept for the breeding or keeping of conies, although the same be not inclosed, and shall then and there wilfully and wrongfully *take or kill*, in the night-time, any coney or conies against the will of the owner or occupier thereof, or shall be aiding or assisting therein, and shall be convicted of the same before any of his majesty's justices of oyer and terminer, or general gaol deli-

very, for the county where such offence or offences shall be committed, every such person and persons so offending, and being thereof lawfully convicted, in manner aforesaid, shall and may be transported for the space of seven years, or suffer such other lesser punishment, by whipping, fine, or imprisonment, as the court before whom such person or persons shall be tried, shall in their discretion award and direct. See the stat. 3 J. 1. c. 13. 22 & 23 C. 2. c. 25. s. 4. 9 G. 1. c. 22.

100. *Indictment for stealing a gelding, under the stat. 2 & 3 E. 6. c. 33 (a).*

One gelding, of the price of six pounds, of the goods and chattels of one J. D. then and there found and being, then and there feloniously did steal, take, and lead away, against the peace, &c.

101. *Indictment under the stat. 5 G. 3. c. 14. for stealing fish out of a park or paddock.*

That A. B. late of, &c. labourer, within six (b) calendar

(a) By stat. 1 E. 6. c. 12. s. 10. no person or persons who shall be convicted of feloniously stealing any horses, geldings, or mares, or being indicted or appealed thereof, and thereupon found guilty by verdict, or shall confess the same upon arraignment, or will not answer directly, or shall stand mute, shall have the benefit of clergy.

This stat. does not in terms extend to such as shall be outlawed, or shall challenge above twenty. The stat. 2 & 3 E. 6. c. 33. declares and enacts, that all persons feloniously taking or stealing any horse, gelding, or mare, shall not be admitted to the privilege of the clergy, but shall be put from the same in like manner and form as though they had been indicted for feloniously stealing of two horses, two geldings, or two mares, and thereupon found guilty by verdict, or confessed the same.

A person who shall apprehend, or prosecute to conviction, any horse-stealer, shall

have a certificate signed by the judge, to exempt him from serving all parish and ward offices. See stat. 10 and 11 W. 3. c. 23. also the st.

(b) Though the prosecution must be commenced within six calendar months, &c. this allegation does not appear to be necessary. See p. 55. 5 East. 259.

By 5 G. 3. c. 14. s. 1. if any person or persons shall enter into any park or paddock fenced in or inclosed, or into any garden, orchard, or yard adjoining or belonging to any dwelling-house, in or through which park or paddock, garden, orchard, or yard, any river or stream of water shall run or be, or wherein shall be any river, stream, pond, pool, moat, stew, or other water, and by any ways, means, or device whatsoever, shall steal, take, kill, or destroy any fish, bred, kept, or preserved in any such river, or stream, pond, pool, moat, stew, or other water aforesaid, without the consent

months next before the day of the taking of this inquisition, to wit, on, &c. with force and arms, at, &c. unlawfully did enter into a certain paddock, then and there fenced in and enclosed, called D. park, of and belonging to M. N. and in which said paddock there then was a certain pond of water, and then and there, to wit, on the said, &c. at, &c. feloniously did steal, take, kill, and carry away certain fish(c), to wit, twenty fish called carp, of the price and value of 20 shillings, and thirty fish called tench of the price and value of 20 shillings, then and there bred, kept, and preserved in such pond of water, without the consent of the said M. N. the owner of the said pond and fish, against the form, &c. and against the peace, &c. (*Add a count for destroying the fish preserved in the same pond.*)

102. Indictment for felony, under the stat. 9 G. 1. c. 22 (d). for appearing armed and disguised, and stealing deer in an inclosed park †.

(Commencement as in pr. 1.) Being armed with

of the owner or owners thereof; or shall be aiding or assisting in the stealing, taking, killing, or destroying any such fish, as aforesaid, or shall receive or buy any such fish, knowing the same to be so stolen or taken, as aforesaid; and being thereof indicted within six calendar months next after such offence or offences shall have been committed, before any judge or justices of gaol delivery for the county wherein such park or paddock, garden, orchard, or yard, shall be, and shall on such indictment be, by verdict, or his or their own confession or confessions, convicted of any such offence or offences as aforesaid, the persons or persons so convicted shall be transported for seven years.

(c) The fish may be described as being the prosecutor's property, but this is not necessary. See p. 182. and see Hudson's case, East. P. C. 611. where the fish were laid to be of the goods and chattels of the prosecutor; but it was holden that the averment might be rejected as surplusage.

(d) By 9 Geo. 1. c. 22. s. 1. it is enacted, that if any person or persons, being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds, inclosed with any wall, pale, or other fence, wherein any deer have been

† See Appendix.

pistols and other offensive weapons, having their faces blacked and disguised, with force and arms, at the parish

or shall be usually kept, or in any warren or place where hares or conies have been or shall be usually kept, or in any high road, open heath, common, or down; or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal, any red or fallow deer; or unlawfully rob any warren or place where conies or hares are usually kept; or shall unlawfully steal or take away any fish out of any river or pond; or if any person or persons, from and after the said first day of June, shall unlawfully and wilfully hunt, wound, kill, destroy, or steal, any red or fallow deer*, fed or kept in any places in any of his majesty's forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed, where deer have been or shall be usually kept; or shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed; or shall unlawfully and malici-

ously kill, maim, or wound any cattle, or cut down, or otherwise destroy, any trees, planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit; or shall set fire to any house, barn, or out-house, or to any hovel, cock-mow, or stack of corn, straw, hay, or wood; or shall wilfully and maliciously shoot at any person in any dwelling-house or other place; or shall knowingly send any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any the offences before mentioned; or if any person or persons shall, by gift or promise of money, or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases

* This branch of the statute is repealed by the stat. 16 G. 3. c. 30. See Davies's case, Leach, 306.; but, by the stat. 42 G. 3. c. 107. if any person shall course or hunt, or shall take in any slip, noose, toil, or snare, or shall kill, wound, or destroy, or shall shoot at, or otherwise attempt to kill, wound, or destroy, or shall carry away any red or fallow deer, in any forest, chase, purlieu, or ancient walk, whether inclosed or not, or in any enclosed park, paddock, wood, or other enclosed ground, where deer are, have been, or shall be, usually kept, without the consent of the owner, or without being otherwise duly authorised, or shall be aiding, abetting, or assisting therein or thereunto, every person so wilfully offending as aforesaid, in any of the cases above mentioned, shall be deemed and taken to be guilty of felony, and being lawfully convicted thereof, upon indictment, shall be adjudged to be transported for the term of seven years.

aforesaid, in the county aforesaid, in a certain park, there lying and being, (inclosed with wooden pales, where deer had been usually and then were kept, belonging to M. N.) unlawfully and feloniously did enter and appear, and one fallow deer of the price of forty shillings, of the goods and chattels of the said M. N. in the same park then and there being found, with force and arms, then and there unlawfully, wilfully, and feloniously did hunt, wound, kill, destroy, steal, take, and carry away, against the form of the statute, &c. and against the peace, &c.

103. *Indictment for killing a sheep, with an intent to steal part of the carcase, under the stat. 14 G. 2. c. 6. s. 1 (e).*

One sheep, of the price of 20 shillings, of the goods

of felony without benefit of clergy. Made perpetual by 81 G. 2. c. 42.

By sec. 13. prosecutions to be commenced within three years from the time of the offence committed, and not after.

By sec. 14. every offence that shall be done or committed contrary to the act, shall and may be inquired of, examined, tried, and determined in any county within the kingdom of England, in such manner and form as if the fact had been therein committed.

By the same section, no attainder for any offences made felony by virtue of this act, shall work any corruption of blood, loss of dower, or forfeiture of lands or tenements, goods or chattels.

(e) The stat. enacts, that if any person or persons shall feloniously drive away, or in any other manner feloniously steal, one or more sheep, or other

cattle, of any other person or persons whatsoever, or shall wilfully kill one or more sheep, or other cattle, of any other person or persons whatsoever, with a felonious intent to steal the whole carcase or carcasses, or any part or parts of the carcase or carcasses, of any one or more sheep, or other cattle, that shall be so killed, or shall assist or aid any person, &c. to commit such offence or offences, the person guilty, &c. being thereof convicted, shall be adjudged guilty of felony without benefit of clergy.

The words cattle are, by the stat. 15 G. 2. c. 34. declared to mean and extend to any bull, cow, ox, steer, bullock, heifer, calf, or lamb, as well as sheep.

Cooke was indicted for stealing a sow; upon evidence it appeared that the beast was an heifer; and the judges held, that since the statute particularly mentions heifer as well as

and chattels of C. D. then and there being found, then and there wilfully and feloniously did kill, with a felonious intent to steal part of the carcase, that is to say, the inward fat of the said sheep, against the form, &c. and against the peace, &c.

104. *For stealing shrubs from a garden (f).*

On, &c. in the night-time, to wit, about the hour of

cow, the description was improper. Cooke's case, Leach, 123. East, P. C. 617.

If a person remove sheep or lambs from the place in which they are kept, and afterwards kill them, with intent, &c. he may be indicted for stealing them, for the larciny is completed by the removal, Rawlins's case, East. P. C. 617. Crompt. 36. pl. 17.

(f) By 6 G. 3. c. 36. s. 1. every person who shall, in the night-time, pluck up, dig up, break, spoil, or destroy or carry away any root, shrub, or plant, or roots, shrubs, or plants, of the value of 5s. and which shall be growing, standing, or being in the garden ground, nursery ground, or other inclosed ground of any person or persons whatsoever, shall be deemed guilty of felony; and the court shall have authority to transport the offender for seven years*. And by the same statute, those who shall wilfully aid and assist therein, or who shall receive such roots, &c. of the value aforesaid,

knowing the same to be stolen, shall be subject to the same penalty as if they had stolen the same. By another stat. passed the same sessions, (c. 48, s. 3.) to pluck up, cut, spoil, or destroy, or take or carry away any root, shrub, or plant, roots, &c. out of the fields, nurseries, gardens, or other garden grounds, or other cultivated lands of any person or persons, without consent of the owner, is an offence punishable, in the first instance, by a fine not exceeding 40s. in the second not exceeding 5l.; but if a person so convicted, offend a third time, and be convicted, he shall be deemed guilty of felony. This stat. it has been holden, did not repeal the former, which embraces those offences only which are committed in the night-time, and where property amounts to 5s. *R. v. Hitchcock and Howe*, Leach, 541.

By the stat. 6 G. 3. c. 36. The destroying, damaging, or stealing of timber trees, in the night time, and without the

* The court is not bound to pass sentence of transportation under this stat. but may pass any other sentence applicable to a single larceny. Leach, 541. East, P. C. 589.

12 in the night of the same day, with force and arms; — shrubs called — of the value of 5s. and — plants called — of the value of 5s. then and there growing in a certain garden ground of E. F. there situate, and then and there being the property of the said E. F. did feloniously pluck up and steal, take, and carry away; against the form, &c. and against the peace, &c.

105. *Indictment for stealing above the value of forty shillings in a dwelling-house.*

(Commencement as in *pr.* 1 and 87.) Of the goods and chattels of one E. F. in the dwelling-house (g) of him

consent of the owner, is felony, and punishable by transportation for seven years.

And aiders and abettors are subject to the like punishment.

By the stat. 6 G. 3. c. 48. the same offence (without limitation to *the night*) is punishable by a fine, not exceeding 20l. on conviction for the first offence, before one justice, by a fine not exceeding 30l. for the second, and if a person so convicted offend a third time, he shall be deemed guilty of felony.

(g) The owner's name is essential, see p. 177.; and the act does not extend to a stealing in the defendant's own dwelling-house, *R. v. Macdaniel and Thompson*, Leach, 379. Gould's case, Leach, 257. East, P. C. 644.; and it must be such as a burglary may be committed in. Dalton, ch. 58. *R. v. Davis, alias Silk*. East, P. C. 499.

In Campbell's case, East. P. C. 644. the prisoner lodged at the house of the prosecutrix, who sent him a note, which

she requested him to change; on pretence of procuring change, he left the house and absconded; and it was held by the judges, that the case was not within the act, since the property was not under the protection of the house. And the same was held in *Owen's* case, East's P. C. 645. who pretending to have found a cross, decoyed the prosecutor into an house, and feloniously obtained 105 guineas from him. And the same was determined in the cases of *Castledine and Watson*, East, P. C. 645, 6. Where money was stolen from under the pillow of a person sleeping in a dwelling-house, it was held, by Chambre, J.; Lancaster Summer Assizes, 1812, that the case was not within the stat.; but *Ward* was convicted and received sentence of death in a similar case; cor Bayley, J. Lancaster Summer Assizes, 1814. Note, *Ward* was a guest at an inn. See 1 Hale, 554. Bank notes are within the statute, *Dean's* case, Leach, 798;

the said E. F. then and there being found, then and there feloniously did steal; take, and carry away, against the peace, &c. (h).

106. Indictment of felony for stealing above the value of five shillings in a shop (i).

(Commencement as in *pr.* 87.) Of the goods and chat-

Milne's case, East, P. C. 602. Sess. Pap. May. 1796, p. 615.; for by the stat. 2 G. 2. c. 25. the stealing of such securities is placed on the same footing with stealing goods of like value with the sums secured. But see Dunmow's case, 1 Haw. c. 36. s. 7.

(h) The stat. 12 Ann. stat. 1. ch. 7. s. 1. enacts, that any person who shall feloniously steal any money, goods, &c. of the value of forty shillings or more, being in a dwelling-house or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offenders, and although the owner of such goods, or any other person or persons, be not in such house or outhouse, or shall assist or aid any person to commit such offence, being convicted or attainted, by verdict or confession, &c. shall be absolutely debarred of clergy, &c.

(i) By stat. 10 & 11 Will. 3. ch. 23. s. 1. if any person shall at any time or times, by night or in the day-time, in any shop, warehouse*, coach-house, or stable, *privately†* and *feloniously* steal any goods, wares, or merchandizes, being of the value of five shillings or more, (although such shop, &c. be not broken open, &c.) or shall assist, hire, or *command‡* any person to commit such offence, &c. he shall not have the benefit of clergy. By the stat. 1 G. 4. c. 117. so much of the above act is repealed as relates to the privately and feloniously stealing any goods, wares, or merchandizes under the value of 15l. And, by the second section of the same act, any person who shall privately and feloniously steal any goods, wares, or merchandizes, of the value of 5l. or more, being under the value of 15l. in any shop, warehouse, coach-house, or sta-

* It has been held that a warehouse, in which goods are deposited for exportation, &c. and not for sale, is not within the meaning of this act. Howard's case, O. B. 1751. Fost. 77. East. P. C. 642. Godfrey's case, Leach, 322.

† And, therefore, if any force be used, the case is not within this act. Fost. 79. East. P. C. 641. Cartwright's case. But the stat. 3 & 4 W. & M. c. 9. s. 1. extends to breaking in.

‡ This word comprehends those who invite, procure, or stir up any other person to do the fact. Fost. 126. 1 Hale, 565. 2 Haw. c. 83. s. 65. 66.

tels (*k*) of one E. F. in the shop of him the said E. F. then and there being found, then and there *privately* and feloniously did steal, take and carry away, and against the form of the statute, &c. and against the peace, &c.

107. *Indictment for stealing in the dwelling-house to the amount of 40 shillings; putting the owner in fear, under the stat. 3 & 4 W. & M. c. 9. s. 1. (l).*

(Commence as in *pr.* 1.) One silver tankard of the

ble, or who shall aid or assist any person to commit such offence, shall be liable to transportation for life, or for such term not less than seven years as the court before whom, &c. shall adjudge, or if the said court shall think fit to be imprisoned only, or to be imprisoned and kept to hard labour in the Common Gaol, House of Correction, or Penitentiary House for any term not exceeding seven years.

(*k*) The goods stolen must be the property of the owner of the shop, &c. otherwise the offender does not lose his clergy; for this act was made as a remedy for the owners of the shops to preserve their goods for sale, &c. See Howard's case, Fost. 77. and Stone's case, Leach, 375.

It has been doubted whether

the box-coat, or any part of the clothes of a coachman, can be considered as part of the proper or usual furniture of a stable, within the meaning of this act, which seems only to include bridles, saddles, horse-cloths, &c. Fost. 78. Sea's case, Leach, 341.

Money is not within the act, the words being "goods, wares, or merchandizes." Fost. 79. Mill's case, Leach, 294. See also Stone's case, *supra*.

(*l*) By this statute, "all and every person or persons who shall rob any other person, or shall feloniously take away any goods or chattels being in any dwelling-house, the owner or any other* person being therein, and put in fear, or shall rob† any dwelling-house in the day-time, any person being therein; or shall comfort, aid, abet, as-

* It has been doubted whether it is not necessary that some person in the dwelling-house should be put in fear, East. P. C. 634. in analogy to Lord Coke's construction of a similar clause in the stat. 1 E. 6. c. 12.

† The word *robbing* implies a *breaking*. East. P. C. 636. 1 Hale, 548. Kel. 68. 69.; but under this branch of the statute, it is not necessary to allege a robbery in technical words, that is, with violence from the person; but it is sufficient to oust the offender, to allege a breaking of the house and taking goods there, such a person being therein. 1 Hale, 522. 2 Hale, 354. 2 Haw. c. 33. s. 93. The breaking must be such as would amount to a burglary, if committed in the night-time. 1 Hale, 523. 526. 2 Hale, 355. 357, 8. Fost. 108. And the same rule seems to prevail, as to what shall be deemed a dwelling-house. East. P. C. 637.

value of fifty (m) shillings, of the goods and chattels of E. F. in the dwelling-house of E. F. there situate, then and there being found, feloniously did steal, take, and carry away; and him the said E. F. then and there being in the said dwelling-house, did then and there put in bodily fear (n) of his life, against the form of the statute, &c. and against the peace, &c.

108. *Indictment for stealing plate out of the chapel belonging to Magdalen College, in Oxford, against the principal and the accessories before the fact (o).*

(Commencement as in pr. 1.) About the hour of one in the night of the same day, with force and arms, at the parish aforesaid, in the city and county aforesaid, a certain chapel and mansion-house of God, there situate, called Magdalen College Chapel, feloniously and burglariously did break and enter, and one pair of silver candlesticks gilt with gold, of the value of seven pounds; one pair of mettle candlesticks gilt with gold, of the value of three pounds; and one communion silver dish gilt with gold, of the value of fifteen pounds, of the goods and chattels of the president and scholars of St. Mary Magdalen College, in the university of Oxford, in the said chapel and mansion-house then and there being found, feloniously and burglariously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity: and the jurors aforesaid, upon their

sist, counsel, hire, or command, any person or persons to commit any of the said offences, or to break any dwelling-house, shop, or warehouse thereunto belonging, or therewith used in the day-time, and feloniously take away any money, goods, or chattels, of the value of 5s. or upwards, therein being; although no person shall be within such dwelling-house, shop, or warehouse, being thereof convicted or attainted, &c. shall not have the benefit of clergy.

(m) Unless the taking amount to a robbery, it is essential, it has been said, that the value of the goods taken should exceed one shilling. 2 Hale, 532. East. P. C. 634.

(n) It is essential to aver, that the person in the dwelling-house was put in fear by the prisoner. *R. v. Etherington and Brook*, Leach, 771. East. P. C. 635.

(o) From the Crown Circuit Assistant, p. 177.

oath aforesaid; do further present; that T. G. late of the parish aforesaid, in the city and county aforesaid, labourer, and W. M. late of the same, labourer, before the committing of the said felony and burglary in manner and form aforesaid, to wit, on the said twenty-fourth day of February, in the year aforesaid, with force and arms, at the parish aforesaid, in the city and county aforesaid, did feloniously and maliciously incite, move, procure, aid and abet, counsel, hire, and command the said M. W. to do and commit the said felony and burglary in manner and form aforesaid, against the form of the statute in such case made and provided; and against the peace of our said lord the king, his crown and dignity. (*Commencement as in pr. 7.*) One pair of silver candlesticks gilt with gold, of the value of seven pounds; one pair of metal candlesticks gilt with gold, of the value of three pounds; and one communion silver dish gilt with gold, of the value of fifteen pounds, of the goods and chattels of the said president and scholars of Saint Mary Magdalen College aforesaid, in the same chapel of the same college then and there being found, then and there feloniously and *sacrilegiously* did steal, take, and carry away, against the form, &c. and against the peace, &c.; and the jurors aforesaid, upon their oath aforesaid, do further present, That, (*charging T. G. and W. M. as accessories before the fact to the felony and sacrilege.*) (*3rd count, commencement as in pr. 7.*) about the hour of one in the night of the same day, with force and arms, at Magdalen College, in the city and county aforesaid, a certain chapel and mansion-house of God, there situate, called Magdalen College Chapel, feloniously and burglariously did break and enter, and one pair, &c. (*here set out the goods as before.*) of the goods and chattels of the president and scholars of St Mary Magdalen College aforesaid, in the said chapel and mansion-house then and there being found, feloniously and burglariously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity; and the jurors aforesaid, &c. *charging T. G. and W. M. as accessories before the fact to the felony and burglary.* (*4th count, commencement as in pr. 7.*) at Magdalen College aforesaid, in the city and county aforesaid, one pair, &c. (*here set out the goods as before*) of the goods and chattels of

the president and scholars of Magdalen College aforesaid, in the same chapel of the same college then and there being found, then and there feloniously and sacrilegiously did steal, take, and carry away, against the form of the statute, &c. and against the peace, &c. and the jurors aforesaid, &c. *charging T. G. and W. M. as accessories, before the fact, to the last-mentioned felony and sacrilege. (5th count, commencement as in pr. 7.)* about the hour of one in the night of the same day, with force and arms, at Magdalen College aforesaid, in the university of Oxford aforesaid, in the county aforesaid, a certain chapel and mansion of God, there situate, called Magdalen College Chapel, feloniously and burglariously did break and enter, and one pair, &c. *(here set out the goods as before)* of the goods and chattels of the said president and scholars of Magdalen College aforesaid, in the said chapel and mansion-house then and there being found, feloniously and burglariously did steal, take, and carry away, against the peace, &c. and the jurors aforesaid, &c. *charging T. G. and W. M. as accessories before the fact, to the last-mentioned felony and burglary. (6th count, commencement as in pr. 7.)* at Magdalen College aforesaid, in the university of Oxford aforesaid, in the county aforesaid, one pair, &c. *(here set out the goods as before)* of the goods and chattels of the said president and scholars of Magdalen College aforesaid, in the same chapel of the same college then and there being found, then and there feloniously and sacrilegiously did steal, take, and carry away, against the form of the statute, &c. and against the peace, &c. And the jurors aforesaid, &c. *(charging T. G. and W. M. as accessories before the fact to the last-mentioned felony and sacrilege.)*

109. *Indictment of felony for sacrilege, in stealing goods out of a church.*

(Commencement as in pr. 1.) One silver cup, of the value of six pounds, of the goods and chattels of the parishioners of the said parish (in the custody of W. T. and D. E. then churchwardens of the same parish), in the church of the parish aforesaid then and there being found, then and there feloniously and sacrilegiously did steal;

take, and carry away, against the form of the statute, &c. (p) and against the peace, &c.

110. *Indictment for stealing from the person.*

(Commencement as in pr. 92. to the*.) Of the goods and chattels of E. F. from the person of the said E. F. then and there feloniously did steal, take, and carry away, against the form, &c. and against the peace, &c. (q).

111. *Indictment of felony for robbery from the person.*

(Commencement as in pr. 1.) In the king's highway

(p) The felonious taking of goods out of any parish church, or other church or chapel, is ousted of clergy as to the principal by stat. 23 Hen. 8. ch. 1. s. 3. 25 Hen. 8. ch. 3. s. 2. and, lastly, by 1 Ed. 6. ch. 12. s. 10.

And by the stat. of 23 Hen. 8. the accessory before, if found guilty by verdict or confession, was ousted of clergy, but that stat. is repealed by the stat. 1. Edw. 6. as to all accessories.

The stat of 4 & 5 Ph. & M. c. 4. does not extend to the case of sacrilege; for it takes away clergy from an accessory before the fact to robbery in any dwelling-house, &c. and does not mention robbing of churches and chapels; but if robbing a church, &c. should be attended with burglary, then clergy would be excluded from the accessories before, by stat. 3 & 4 Will. & Mary, ch. 9. s. 1. 2 Hale, 366.

(q) By the stat. 48 G. 3. c. 129. s. 2. it is enacted, that

every person who shall, at any time or in any place whatever, feloniously steal, take, and carry away any money, goods, or chattels, from the person of any other, whether privily, without his knowledge or not, but without such force or putting in fear as is sufficient to constitute the crime of robbery, or who shall be present aiding and abetting therein, shall be liable to be transported beyond the seas for life, or for such term not less than seven years as the judge or court, before whom any such person shall be convicted, shall adjudge; or shall be liable, in case the said judge or court shall think fit, to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol-house of correction or penitentiary house for any term not exceeding three years.

By the first section of this act, the stat. 8 Eliz. c. 4. which takes away the benefit of clergy, in case of stealing privately from the person, is repealed.

(*r*) there, in and upon one E. F. there being(*s*) *feloniously* did make an assault, and him the said E. F. in bodily fear(*t*) and danger of his life, *in the highway aforesaid*, then and there feloniously did put, and one gold watch, of the value of eighteen pounds (*insert all the goods taken*) of the goods and chattels of the said E. F. from the person(*t*), and against the will(*t*), of the said E. F. *in the highway aforesaid*, then and there feloniously and(*t*) *violently* did steal, take, and carry away, against the peace, &c.

112. *Indictment for stealing linen from a bleaching-croft.*

(*Commencement as in pr. 1.*) Thirty yards of linen cloth, of the value of thirty shillings, of the goods and chattels of C. D. of the parish aforesaid, in the county aforesaid, whitster, then and there being laid, placed, and exposed to be bleached and whitened, in a certain field

(*r*) Benefit of clergy is taken away from those who shall rob any person, or shall comfort, aid, abet, assist, counsel, hire, or command, any person or persons to commit such offence. By the stat. 3 W. & M. c. 9. s. 1. and since the statute is general, and is not confined to a robbery in or near the highway, as the stat. 1 E. 6. c. 12. is, it seems better to omit any special description of the place, though a variance from it would not be fatal. See *Wardle's case*, East. P. C. 785. *R. v. Summers*, ib. *R. v. Darnford and Newton*, ib. and see p. 188.

(*s*) It is essential to aver, that the assault was feloniously made, see p. 90.

(*t*) It is essential to aver, that the property was taken with *violence* from the person, and *against the will* of the party. Fost. 128. 1 Hale, 534. Leach,

229. The allegation that the party was put in fear is of modern introduction : and in *Donally's case*, Leach, 229. it was observed by the judges, that no technical description was necessary, provided it appeared on the whole, that the offence had been committed with violence, and against the will of the party. And in *Smith's case*, East. P. C. 783. the prisoner was charged with assaulting the prosecutor with force and arms, and putting him in corporal fear, and taking a sum of money from his person, against his will ; it was objected, that the taking ought to have been alleged to have been done *violently*, but all the judges agreed, that a robbery was sufficiently described, and that Lord Hale (1 Hale, 534.) was inaccurate in his expression.

and ground of the said C. D. situate, lying, and being in the parish aforesaid, in the county aforesaid, then and there made use (u) of by the said C. D. for the bleaching and whitening of the same linen-cloth, then and there being found, then and there in the same field and ground feloniously did steal, take, and carry away, against the form of the statute, &c. and against the peace, &c.

113. *Indictment for stealing woollen cloth from the tenters.*

On, &c. with force and arms, in the night of the same day, to wit, about the hour of twelve of the night, at the parish aforesaid, in the county aforesaid, ten yards of woollen cloth called bocking, of the value of ten shillings, of the goods and chattels of J. B. (the same cloth then and there being put and being on tenters for the drying thereof,) feloniously did cut, steal, take, and carry away, from the said tenters, against the form of the sta-

(u) The stat. 51 G. 3. c. 41. enacts, that every person, who shall feloniously steal any linen, fustian, calico, cotton-cloth, or cloth worked, woven, or made of any cotton, or linen yarn mixed, or any thread linen, or cotton-yarn linen, or cotton tape, inkle, filleting, laces, or any other linen, fustian, or cotton goods or wares, whatsoever, laid, placed, or exposed to be printed, whitened, bowked, bleached, or dried in any whitening or bleaching croft, lands, fields, or grounds, bowking-house, drying-hoose, printing-house, or other building, ground, or place made use of by any calico-printer, whitster, crofter, bowker, or bleacher, for printing, whitening, bowking, bleaching, or drying of the same, to the value of 10 shillings; or who shall aid or as-

sist, or wilfully or maliciously hire or procure any other person or persons to commit any such offence; or who shall buy or receive any such goods or wares so stolen, knowing the same to be stolen as aforesaid, being lawfully convicted thereof, shall be liable to be transported beyond the seas for life, or for such term not less than seven years as the judge, before whom any such person shall be convicted, shall adjudge; or shall be liable, in case the said judge shall think fit, to be imprisoned and kept to hard labour, in the common gaol-house of correction, or penitentiary-house, for any term not exceeding seven years.

By the first section of this statute, the 18th G. 2. c. 27. which takes away clergy from such an offender, is repealed.

tute, &c., and against the peace, &c. (x). (*Add a count for simple larciny.*)

114. *Indictment for stealing from a ship wrecked.*

That on, &c. a certain ship, called The Nymph, the property of a person or person to the jurors unknown, was stranded at the parish of ———, in the county of ———, and that C. D. late of, &c. labourer, on, &c. with force and arms, at, &c. wilfully and feloniously did plunder, steal, take, carry away, and destroy, one cask of rum, of the value of twenty pounds, then and there being certain goods and merchandizes, the property of a person or persons to the jurors aforesaid as yet unknown, from and belonging to the said ship, so then and there being stranded as aforesaid, against the form of the statute, &c. and against the peace, &c. (y).

(x) By stat. 22 Car. 2. c. 5. s. 3. any person or persons who shall be indicted for feloniously cutting and taking, stealing or carrying away, of any cloth or other woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict, &c. *oust of clergy.*

By s. 4. the judges may re-prieve and transport them, &c.

By stat. 15 Geo. 2. c. 27. s. 1. in case any cloth or woollen goods remaining upon the rack or tenters, or any woollen yarn or wool left out to dry, shall be stolen or taken away in the night time, it shall be lawful for a justice of the peace to issue his warrant to search the houses of suspected persons; and if any such property be found in their custody, they are to be taken before some justice, to whom they must give a satisfactory ac-

count, by evidence, respecting their right to the possession of the same; and on default thereof, they shall be deemed convicted, &c. and forfeit treble value to the owner, &c.

The third offence is felony, punishable by transportation for seven years; and if they return, they are ousted of clergy.

S. 3. "Provided, that this act shall not extend to alter or repeal any law now in force for the punishment of any person or persons stealing or receiving such cloth, woollen goods, woollen yarn, or wool, except in such cases where the proof is laid upon the offender or offenders as aforesaid; any thing herein contained to the contrary notwithstanding."

(y) By 26 Geo. 2. c. 19. s. 1. if any person shall plunder, steal, take away, or destroy any goods or merchandise, or

115. Indictment for stealing to the value of forty shillings in a ship on a navigable river (z).

After the owner's name in pr. 92, insert the words, "in a certain ship, called The Nymph, upon the navigable (a) river Thames," and conclude as in the same precedent.

116. Indictment for stealing lead fixed to a dwelling-house.

(Comm. as in pr. 1.) Sixty pounds weight of lead, of

other effects, from or belonging to any ship or vessel which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore, in any part of his majesty's dominions, or any of the furniture, &c. or part of such ship or vessel, or shall beat or wound, with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his life from such ship or vessel, or the wreck thereof; or if any person or persons shall put out any false light or lights, with intention to bring any ship or vessel into danger; then such person or persons so offending shall be deemed guilty of felony without benefit of clergy.

And by s. 2. when goods or effects of small value shall be stranded, lost, or cast on shore, and shall be stolen without circumstances of cruelty, outrage,

or violence, the offender may be prosecuted and punished as for petit larciny.

(z) To steal any goods*, wares, or merchandizes, of the value of 40 shillings, in any ship, barge, lighter, boat, or other vessel or craft, upon any navigable river, or in any port of entry or discharge, or any creek belonging to any navigable river, &c. or upon any wharf or quay adjacent to any navigable river, &c. or to be present aiding and assisting, &c. is an offence excluded from clergy by the stat. 24 G. 2. c. 45.

(a) An averment that the offence was committed on *the navigable river Thames* is not satisfied by evidence, that it was committed on the banks of one of its creeks; for though the offence is within the act, it should be described in the appropriate words of the act. Leach, 35.

* The statute is confined to such goods or merchandizes as are usually lodged in ships, or on wharfs or quays. A defendant, who stole a quantity of coin, though great part of it was foreign, and not current by proclamation, but commonly current, was held not to be within the act *R. v. Grimes*, Fost. 79. East. P. C. 647. Leigh's case, Leach, 92.

the value of four shillings, belonging to C. D. and then and there fixed to the dwelling-house of the said C. D. from the said dwelling-house then and there did feloniously rip, steal, take, and carry away, against the form of the statute, &c. and against the peace, &c. (b).

(b) The ripping, taking, and carrying away lead, or any other thing fixed to a freehold, was formerly but a misdemeanor; but now, by stat. 4 Geo. 2. c. 32. to steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron gate, iron palisado, or iron rail whatsoever, fixed to any dwelling-house, out-house, coach-house, stable, or *other building* used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house or other building, is felony; and every such felon shall be subject to the like pains and penalties, as in case of felony; and the court, before whom such person, &c. shall be tried, shall have power to transport such felon for seven years. And so it is in the aiders, abettors, and assisters, and such as shall buy or receive such lead or iron, knowing the same to be stolen.

Principals to be transported for seven years. Accessories to have the like punishment.

The indictment must conclude *against the form of the statute*, being a felony created by it. See p. 228.

The stat. 21 G. 3. c. 68. extends the provisions of this

act, and enacts, that those who steal, rip, cut, break, or remove with intent to steal, any copper, brass, bell-metal, utensil, or fixture, being fixed to any dwelling-house, &c. or any iron rails or fencing, set up or fixed in any square, court, or other place, such person having no title or claim of title thereto, shall be deemed and construed to be guilty of felony. The punishment—to be transported for seven years, or to be kept and detained in prison and kept to hard labour for any time not exceeding three years, nor less than one year, and within that time, if the court shall think fit, to be publicly whipped, not more than three times.

Those aiding, abetting, or assisting, in such offence, to be subject to the like punishment. Receivers to be subject to the same punishment as if they had stolen the same, although the principal felon or felons has not or have not been convicted.

A church is a *building* within the meaning of the stat. 4 G. 2. c. 32. *R. v. Parker and Easy*. Suffolk Summ. Ass. June, 1782. East. P. C. 592. and *R. v. Hickman and Dyer*, Leach, 358. East. P. C. 593. For the description of the property in such case, see p. 202.

In Davis's case, East. P. C.

117. Against the receiver.

And the jurors aforesaid, upon their oath aforesaid, do further present, That E. F. late of, labourer, afterwards, to wit, on, &c. at, &c, the said sixty pounds weight of lead, so as aforesaid feloniously stolen, feloniously did receive and have, (he the said E. F. then and there well knowing the said sixty pounds weight of lead to have been feloniously stolen), against the form of the statute, &c. and against the peace, &c. (c).

593. the indictment charged the defendant with stealing iron rails, fixed to a tomb in a church-yard, belonging to a certain building called Islington Church. It appeared that the tomb was not connected by any building with the church, and it was holden that the case was not within the statute; but qu. whether this case is not within the stat. 21 G. 3. c. 67. *supra*, which contains the words "iron rails set up or fixed in any court or other place."

In Senior's case, Leach, 559. East. P. C. 593. it was holden, that a window casement, made of wire, lead, and glass, was not within these statutes.

Where the value of the property, under the 4th of G. 2. does not exceed one shilling, judgment of whipping may be given, as in case of petit larceny, East. P. C. 594. And if the value exceed one shilling, judgment of imprisonment may be given, Munday's case, Leach, 991. East. P. C. 594.

(c) See note (b), p. 478.

By 25 Geo. 2. c. 10. persons entering mines of *black lead* with intent to steal, or who shall from thence steal any *black lead*, &c. and their aiders and abettors, are to be deemed felons; and may, upon conviction, be committed to prison for a year, and publicly whipt, or transported for seven years; and the receivers of such *lead*, &c. knowing the same to have been stolen, shall, upon conviction, suffer the same pains and penalties as are inflicted upon persons receiving any stolen goods or chattels. And by the same statute it is also enacted, that if the principals or their aiders, so committed or transported, shall voluntarily escape or break prison, or return from transportation before, &c. they shall, upon conviction, suffer death, without benefit of clergy.

118. *Indictment against several persons, for piratically taking and carrying away a ship, with its tackle, &c. and certain goods on board the same (d).*

Admiralty (e) of England. With force and arms, upon the high seas (f), in a certain place, distant about ten leagues from Cutsheen, in the East Indies, and within the jurisdiction (f) of the Admiralty of England, did piratically and feloniously (f) set upon, board, break, and enter a certain merchant ship, called 'The Quedagh Merchant, then being a ship of certain persons (to the jurors aforesaid as yet unknown), and then and there piratically and feloniously did assault certain mariners (whose names to the jurors aforesaid are also unknown) in the same ship, and in the peace of God and our said sovereign lord the king then and there being, and did then and there, upon the high sea aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, piratically and feloniously put the said mariners (to the jurors aforesaid as yet unknown), so being in the same ship, in great bodily fear and danger of their lives; and the said merchant ship, called The Quedagh Merchant, and the apparel and tackle of the same ship, of the value of four hundred pounds, of lawful money of Great Britain, together with seventy chests of opium, of the value of fourteen hundred pounds, of like lawful money, then being in and on board the same ship, of the goods and chattels of certain persons (to the jurors aforesaid as yet unknown), and then and there, upon the high sea aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, being under the care and custody, and in the possession of the said mariners, (to the jurors aforesaid as yet unknown,) they the said William Kidd, &c. (the names of all the pirates) with force and arms, from the care, custody, and possession of the said mariners (to the jurors aforesaid as yet unknown) then and there, to wit, upon the high sea aforesaid, in the place aforesaid, and within

(d) This was the indictment used against Kidd and others, 5 St. Tr. 287.

(e) As to the trial, see p. 16.

(f) These averments are essential, see p. 20. 78. 1 Haw. c. 37. s. 6. 10. East. P. C. 805. 3 Ins. 112.

the jurisdiction aforesaid, piratically, feloniously, and against the will of the said last-mentioned mariners, did steal, take, and run away with, against the peace of our said lord the king, his crown and dignity (g).

119. *Indictment against an accessory, before the fact, to a felony.*

After charging the principal felon, proceed thus, And the jurors aforesaid, upon their oath aforesaid, do further present, that L. M. late of, &c. labourer, before the committing the said felony and murder, (or burglary, &c. *as the case is,*) in form aforesaid, to wit, on, &c. with force and arms, at, &c. did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command (h) the said A. B. to do and commit the said felony and ——— in manner and form aforesaid, against the peace, &c. (i).

120. *Indictment against an accessory for receiving the principal felon.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that L. M. late of, &c. labourer, well knowing the said A. B. to have done and committed the said felony and burglary (*according to the fact*) in form

(g) By the st. 32 G. 2. c. 25. s. 20. a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas, within the jurisdiction of the admiralty of England, shall be holden twice at least in every year, viz. in March and October, at the Old Bailey, except when sessions of oyer and terminer and gaol delivery for London and Middlesex, shall be there holden, or in such other places in England as the lord high admiral, &c. shall, in writing under his hand directed to the

judge of the court of admiralty, appoint.

In prosecutions of this nature, the indictment is first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law. 4 Bl. Com. 269. 3 Ins. 114. East. P. C. 812. See the stat. 28 H. 8. c. 15. and the statutes dependent upon it, p. 16, 17, 18.

(h) Vide supra, p. 140, 141, 142. and pr. 27.

(i) For the Evidence, see Starkie's L. Ev. vol. ii. tit. Accessory.

aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. him the said A. B. did feloniously receive, harbour, and maintain, against the peace, &c.

121. *Indictment against an accessory for receiving stolen goods (k).*

And the jurors aforesaid, upon their oath aforesaid, do further present, that L. M. late of, &c. labourer, afterwards, to wit, on, &c. with force and arms, at, &c.* one silver watch, one gold ring, &c. (l) being parcel of the goods and chattels so as aforesaid feloniously and burglariously stolen, taken, and carried away, feloniously did receive and have (he the said L. M. then and there well knowing the same goods and chattels last mentioned to have been feloniously and burglariously stolen, taken, and carried away,) against the form (m), &c. and against the peace, &c.

122. *Indictment against an accessory for receiving goods in one county, the principal having been convicted in another county (n).*

Middlesex. The jurors for our lord the king upon their oath present, that at the delivery of the gaol of our lord the king of his county of Surrey, holden at Kingston upon Thames, in and for the county aforesaid, on, &c. before William earl of Mansfield, lord chief justice of our lord the king, assigned to hold pleas in the court

(k) For the Evidence, see Starkie's L. E. vol. ii. tit. Larciny.

(l) If he received the whole of the goods alleged to have been stolen, merely insert "*the said goods and chattels.*" The description of the property alleged to be received, should agree with that charged to have been stolen; but it is sufficient that it appear to be in fact the same, though it pass under a different denomina-

tion,—as if the principal be charged with stealing a live sheep, and the defendant with receiving 20 lb. of mutton, part of the goods stolen. Cowell and Green's case, East. P. C. 331. and see tit. Surplusage, p. 248.

(m) 3 W. and M. c. 9. s. 4. See p. 485.

(n) This indictment is authorized by the st. 2. & 3 E. 6. c. 24, see p. 7.

of our said lord the king, before the king himself, and Sir William Henry Ashhurst, knight, one other of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, then justices of our said lord the king, assigned to deliver the said gaol of the prisoners therein being, M. T. late of the same parish of Lambeth, in the said county of Surrey, labourer, was duly convicted (o); for that he the said M. T. &c. on, &c. with force and arms, at, &c. seventeen yards of linen cloth, of the value of thirty shillings, of the goods and chattels of one T. W. then and there being found, feloniously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity, as by the record thereof remaining filed in the said court of gaol delivery, may more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. late of, &c. in the county of Middlesex, labourer, afterwards, to wit, on, &c. with force and arms, at, &c. (*and then proceed as in pr. 117 from the *.*)

123. *Indictment for a misdemeanor, in receiving stolen goods (p).*

(*Comm. as in pr. 1.*) One silver tankard, of the value

(o) It is not necessary to allege, that the principal was *attainted*. Hyam's case, East. P. C. 782.; as to this form of indictment, see p. 169. Qu. whether it ought not expressly to aver the commission of the felony in the first county. See p. 169. 140: Lord Sanchar's case, 9 Co. 114:

(p) See the different statutes, p. 485. n. (u).

If the prisoner can be indicted as an accessory to a felony, he ought not to be tried for a misdemeanor, for the prosecutor has no election. See Fost. 374, and per Thompson,

Baron, Lanc. Lent. Ass. 1813. (contrary to what is said in the case of *R. v. Pollard and Taylor*, 2 Ld. Ray. 1730: and in Jonathan Wild's case, East. P. C. 746:) where, upon an indictment under the stat. 5 Ann. for a misdemeanor, it appeared that the principal had been *convicted*, it was holden, that the defendant ought to be acquitted. In Wilkes's case, Leach, 121. East. P. C. 746: it appeared, that the prosecutor might at one time have taken the principal into custody, but had neglected so to do, and that he could not after:

of six pounds (*q*), of the goods and chattels of one C. D. by one E. F. (*r*) then lately before (*s*) feloniously stolen of the said E. F. unlawfully, unjustly, and for the sake of wicked gain did receive and have, (the said A. B. then and there well knowing the same to have been feloniously stolen,) against the form of the statute (*t*), &c. and against the peace, &c.

124. *Indictment against two for unlawfully receiving stolen lead, under the stat. 29 G. 2. c. 30. s. 1. See p. 485; note (u).*

(*Commencement as in pr. 1.*) Unlawfully and unjustly did buy and receive, and each of them did buy and receive, ten pounds weight of lead, of the value of two shillings, of the goods and chattels of one E. F. then lately before feloniously stolen, taken, and carried away by one G. H. they the said A. B. and C. D. then and there well knowing the same to be stolen and unlawfully come by, against the form of the statute, &c. and against the peace, &c. (*Second count.*) to wit, on, &c. with force and arms, at, &c. unlawfully and unjustly, and in a clandest-

wards be met with: the defendant was indicted under the stat. 5 Ann. for a misdemeanor, and a majority of the judges were of opinion, since the conviction was proper; that the word *cannot*, in the statute, relates to the time of the prosecution. But by the 22 G. 3. c. 58. the receiver may be prosecuted for the misdemeanor, whether the principal be amenable to justice or not. But still if the principal has been *actually convicted* the receiver must be indicted for the felony. It never has been held necessary to allege in the indictment, that the principal could not be taken, &c. *Baxter's case*, 5 T. R. 83. 2 *Ld. Ray.* 1370. *East. P. C.* 781. or

that he had not been convicted, see p. 29. 171.

(*q*) An indictment, under the stat. 22 G. 2. c. 58. s. 1. against the receiver for a misdemeanor, will lie, though the felony amount to petit larceny only. *Baxter's case*, 5 T. R. 83. *Leach*, 660.

(*r*) The name of the principal need not be stated in an indictment against the receiver for a misdemeanor. See p. 168. and *Thomas's case*, *East. P. C.* 781. *Baxter's case*, 5 T. R. 83. but if known ought to be stated, *East. P. C.* 783.

(*s*) It is unnecessary to allege the stealing of the goods, with time or place. *R. v. Stott*, *East. P. C.* 780.

(*t*) See the next note.

line manner, that is to say, by, '*(set out the manner,)* did buy and receive, from the aforesaid G. H. other ten pounds weight of lead, of the value of two shillings, of the goods and chattels of the aforesaid E. F. lately before feloniously stolen, taken, and carried away by certain ill-disposed persons, to the said jurors unknown, against the form of the statute, &c. and against the peace, &c. (u).

(u) By stat. 3 Will. and M. ch. 9. s. 4. buyers and receivers of stolen goods, knowing them to be stolen, are to be deemed accessories after the fact, and suffer as such.

By 1 Ann. stat. 2. c. 9. s. 2. whosoever shall buy or receive stolen goods, knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted.

And this will exempt them from being punished as accessories, if the principal shall afterwards be convicted.

By stat. 5 Ann. c. 31. s. 5. if any person shall receive or buy any goods or chattels, that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour, or conceal, any burglars, felons, or thieves, knowing them to be so, he shall be taken as accessory to the said felony or felonies, and being legally convicted, &c. shall suffer death as a felon.

And by sec. 6. if any such principal felon cannot be taken so as to be prosecuted or convicted for any such offence, yet, nevertheless, it shall and may be lawful to prosecute and punish every such person

buying or receiving any goods stolen by such principal felon, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, although the principal felon be not before convicted of the said felony, which shall exempt the offender from being punished as accessory, if such principal felon be afterwards taken and convicted.

By stat. 4 Geo. 1. c. 11. receivers of stolen goods may be transported for fourteen years; but they must pray the benefit of the statute, East. P. C. 744. and the felony must be such as admits of accessories at common law, Fost. 73. East. P. C. 744. but this has been supplied by the stat. 22 G. 3. c. 58: cited below.

By stat. 4 Geo. 2. c. 32. to steal, rip, cut, or break, with intent to steal any lead or iron bar, iron grate, iron palisado, or iron rail whatsoever, fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or fixed in any garden, orchard, courtyard, fence, or outlet, belonging to any dwelling-house or other building, is felony: and

125. *Indictment of felony for receiving money to help a person to stolen goods, and not apprehending the felon.*

That, on, &c. at, &c. a certain person, to the jurors uni-

so it is in the aiders, abettors, and assisters, and such as shall buy or receive such lead or iron, knowing the same to be stolen:

Principals so be transported for seven years. Accessories to suffer the like punishment.

By stat. 29 Geo. 2. c. 30. s. 1. every person who shall buy or receive any lead, iron, copper, brass, bell-metal, or solder, knowing the same to be stolen, or unlawfully come by; or shall privately buy or receive any stolen lead, &c. by suffering any door, window, or shutter to be left open or unfastened, between sun-setting and sun-rising, for that purpose, or shall buy or receive the same, or any of them, at any time, in any clandestine manner, shall be transported for fourteen years, although the principal felon has not been convicted of stealing the same.

By 21 Geo. 3. c. 69. every person who shall buy or receive any pewter pot or other vessel, or any pewter in any form or shape whatsoever, knowing the same to be stolen or unlawfully come by, &c. shall, upon conviction, be transported as a felon for seven years.

And by stat. 10 G. 3. c. 48. every person who shall buy or receive any stolen jewel or jewels, or any stolen gold or silver plate, watch or watches,

knowing the same to have been stolen, shall, in all cases where such jewel or jewels, or gold or silver plate, shall have been feloniously stolen, accompanied with a burglary actually committed in stealing the same, or shall have been feloniously taken by a robbery on the highway, be triable as well before conviction of the principal felon, whether he be in or out of custody, as after his conviction; and if such person so buying or receiving shall be convicted thereof, he shall be guilty of felony, and transported for fourteen years.

By the stat. 21 G. 3. c. 69: persons receiving any pewter, knowing, &c. although the principal felon has not been convicted, shall, upon conviction, be transported in like manner as other felons are directed to be transported for seven years, or imprisoned and kept to hard labour for any time not exceeding three years; nor less than one year; and within that time, if the court shall think fit, may be once or oftener, but not more than three times publicly whipped.

And by 22 Geo. 3: c. 58. s. 1: it is enacted, that from and after the 1st day of August, 1782, in all cases whatsoever, where any goods or chattels, (except lead, iron, copper, brass, bell-metal, and

known, a gold watch, of the value of twenty pounds, of the goods and chattles of one J. L. from the person of him the said J. L. with force and arms, feloniously did steal, take, and carry away. And that R. D. late of, &c. labourer, afterwards, to wit, on, &c. at, &c. (notwithstanding he the said R. D. did not apprehend, and cause to be apprehended, the said felon who stole the said watch as aforesaid, and cause the said felon to be brought to his trial for the same, and give evidence against him,) he the said R. D. with force and arms, under pretence and upon account of helping the said J. L., to his said watch, so feloniously stolen as aforesaid, did then and there wilfully, unlawfully and feloniously take, of and from the said J. L. the sum of seven pounds, of lawful money of Great Britain, and did then and there deliver the same watch, so as aforesaid feloniously stolen, to him the said J. L. against the form of the statute, &c. and against the peace, &c. (x).

solder,) shall have been feloniously taken or stolen, whether the offence of the person or persons so taking or stealing the same, shall amount to grand larciny, or some greater offence, or to petit larciny only, (except where the person or persons actually committing the felony shall have been already convicted of grand larciny, or of some greater offence), every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be held and deemed guilty of, and may be prosecuted for a misdemeanor, and shall be punished by fine and imprisonment, or whipping, as the court of quarter-sessions, who are hereby empowered to try such offender, or as any other court before which he, she, or they shall be tried, shall think fit to inflict, *although*

the principal felon or felons be not before convicted of the said felony, and whether he, she, or they, is or are amenable to justice or not, any law or statute to the contrary notwithstanding; and in cases where the felony actually committed shall amount to grand larciny, or to some greater offence, and where the person or persons actually committing such felony shall not be before convicted, such offender or offenders shall be exempted from being punished as accessory or accessories, if such principal felon or felons shall be afterwards convicted.

(x) By stat. 4 Geo. 1. c. 11. s. 4. it is enacted, that where-ever any person taketh money or reward, directly or indirectly, under pretence or upon account of helping any person or persons to any stolen goods or chattels; every such person,

FRAUDS.

126. *Indictment for cheating, at common law (a), by means of false cards.*

That A. B., &c. being persons of dishonest conversa-

so taking money or reward as aforesaid, (unless such person doth apprehend, or cause to be apprehended, such felon who stole the same, and cause such felon to be brought to his trial for the same, and give evidence against him,) shall be guilty of felony, and suffer the pains and penalties of felony, according to the nature of the felony committed in stealing such goods, and in such and the same manner as if such offender had himself stolen such goods and chattels, in the manner and with such circumstances as the same were stolen.

Jonathan Wild was tried on the above-recited clause, convicted, and executed, 10 G. 1.

(a) Where a fraud is practised upon a private person, it seems that an indictment is not maintainable at common law on the ground of that fraud, unless it be effected by means which either do or may prejudice the public at large, for otherwise, since the detriment is confined to the individual imposed upon, it may be recompensed by his resorting to an action for damages. In Wheatley's case, 2 Burr. 1127. the defendant was charged with selling and delivering 16

gallons of amber for and as 18 gallons of that liquor, and the court were clearly of opinion that the offence was not indictable, but was only a civil injury, for which an action lay.

So the detaining part of a quantity of wheat sent to the defendant's common grist mill to be ground, is not indictable, no actual force being laid, nor any unreasonable toll being charged. Channell's case, Str. 793. East. P. C. 818. So the selling a sack of corn in the market as containing a Winchester bushel, when in fact it does not contain so much, is not indictable, for it amounts to no more than the telling a bare naked lie. Pinkney's case, 1 Sess. Cas. 198. East. P. C. 818. see *R. v. Munoz*, 2 Str. 1127. 7 Mod. 815. So where one obtains money from another under pretence that he is authorized by a third person. Jones's case, Salk. 379. *R. v. Gibbs*, 1 East. R. 185. So where one obtained goods from a tradesmen under pretence of being sent by a customer. Bryan's case, 2 Str. 866. In Lara's case, 6 T. R. 565. the defendant obtained lottery tickets by pretending to purchase them, and by delivering to the owner an order

tion, and common gamblers and deceivers, with false dice and cards, on, &c. at, &c. contriving, practising, and

for money purporting to be a draft upon the defendant's banker, knowing that he had no authority to draw upon that banker, and that the draft would not be paid; yet judgment was arrested, on the ground that the banker's check entitled the defendant to no more credit than his own bare assertion, and that no false token was used to accomplish the deceit; and the same was holden in Wilders's case, cited 2 Burr. 1128. where the defendant was indicted for sending to a publican, vessels of ale falsely marked, as containing such a quantity. But this in the case of the *King v. Wheatly*, was considered to be a strong case.

But where, in respect of the means used, the injury is not confined to the individual, but is extended, or is likely to be extended, indefinitely, to the prejudice of the community, the offence becomes indictable. And, therefore, frauds have been holden indictable when effected by means of *false tokens, forgeries, or conspiracies*; and *false tokens* seem to include all instruments, documents, or signs, the use of which manifest an intention to impose upon the public generally, which are calculated to deceive all indifferently, and against which ordinary circumspection and prudence do not afford a sufficient protection; and, therefore, an indictment lies for

selling by false weights or measures, 1 Sid. 409. Pinkney's case, East. P. C. 818. and the winning by means of false cards or dice, 2 Roll. Ab. 78. Cro. J. 497. 2 Roll. R. 107. East. P. C. 820. so the selling of precious metals by a goldsmith under a false representation of their purity and quality, seems to be indictable as a fraud affecting the public in general, and not confined to the individual, Trem. P. C. 105, 106. (But see *R. v. Bower*, Cowp. 320. where it was held, that such a cheat committed by a pawnbroker, was not indictable. So where the fraud is effected by means of *forgery*, as where cloth was sold with the alnearer's seal counterfeited upon it. Edwards's case, Trem. P. C. 108. So where the defendant sold cloth with the general seal of the trade counterfeited upon it. Worrell's case, Trem. P. C. 106. So in Gower's case, Say. 206. where the defendant was charged with obtaining goods by the production of several forged and counterfeited letters, which he falsely affirmed were letters from Spain, containing commissions for jewels, watches, and other goods, to a large amount. So in Hale's case, 9 St. Tr. 75. where the defendant was indicted for having obtained 450*l.* by a false token, viz. a promissory note with a counterfeit indorsement thereon, see also Ward's

falsely, fraudulently, and deceitfully intending one A. S. with false cards and false play, falsely, unlawfully, unjustly, fraudulently, and deceitfully to deceive and defraud, and from the said A. S. by means of the said false cards and false play, craftily and subtly, falsely, fraudulently, and deceitfully, different sums of money to acquire and obtain, then and there did solicit, excite, provoke, and procure the said A. S. to play with them the said A. B. &c. at a certain unlawful game called whist, for divers sums of money, by means whereof the said A. S. did then and there play with the said A. B. &c. at the said unlawful game called whist, for divers sums of money, and that the said A. B. &c. did then and there, with force and arms at the said unlawful game called whist, by means of false cards and false play, subtly,* falsely, unlawfully, and fraudulently receive, have, and obtain into their own hands and possession, the sum of 80l. of lawful monies of the said A. S. and from the said A. S. and the same did then and there carry away, to the great damage, &c. and against the peace, &c.(b).

(2nd count, for cheating at a game of dice called passage.) intending as aforesaid, on, &c. at &c. subtly, falsely,

case, 2 Str. 749. *R. v. Bryan*, 2 Str. 866. Gibbs's case. 1 East. 173. So where the fraud is effected in pursuance of a conspiracy, as in the case of Skirret and others, 1 Sid. 312. who were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written, see also *R. v. Parris* and others, 1 Sid. 431. *R. v. Breerton* and others, Ray. 103. So in the *King v. Orbell*, 6 Mod. 42. the defendant was convicted upon a charge of having run a foot-race fraudulently, with a view to cheat a third person, by means of a private confederacy and agreement between

himself and his competitor that he should win.

And, in general, wherever the fraud is of such a nature as immediately to affect the crown or the public, it is indictable though it arise out of a particular transaction or contract: as where the defendant, who had contracted to supply French prisoners with provisions, was indicted for supplying them with unwholesome food, not fit to be eaten. *R. v. Treeve*, East. P. C. 824.; or where an apprentice enlists and receives bounty money, without the consent of his master. *R. v. Jones*, 1 Leach, 208. East. P. C. 822.

(b) *R. v. Arnope*, Trem. 91. and see *R. v. Betsworth*, Trem. 93.

unlawfully, &c. did solicit, excite, provoke, and procure the said A. S. to play with them the said A. B. &c. at a certain unlawful game called *passage*, for divers sums of money, by means whereof the said A. S. did then and there play with the said A. B. &c. at the said unlawful game called *passage*, for divers sums of money, and that the said A. B. &c. did then and there, with false dice and by false throwing of the same, that is to say, by slurring the said dice subtly, &c. (*as before, from the* to the end.*)

127. *Indictment for selling cloth with the alneager's seal counterfeited thereon (c).*

That A. B. &c. being persons of bad name, fame, and conversation, on, &c. with force and arms, at, &c. contriving, and falsely, fraudulently, and deceitfully intending to deceive and defraud our said lord the king of the profit of the subsidy of cloth, unlawfully, unjustly, falsely, fraudulently, and deceitfully, counterfeited and forged, and caused and procured to be counterfeited and forged, a certain seal, to the likeness and similitude of the seal of the alneager and collector of the said subsidy, and then and there, with force and arms, falsely, &c. and without any legal warrant or authority, 30 pieces of woollen cloth called serge, of the goods and chattels of some person unknown, with the said false and counterfeited seal did, and each of them did seal and cause to be sealed; and that the said A. B. &c. the aforesaid 30 pieces of woollen cloth called serge, so as aforesaid sealed with the said false and forged seal, then and there with force and arms &c. unlawfully, &c. delivered the same to divers persons unknown, as and for 30 pieces of woollen cloth lawfully sealed by the collector of the said subsidy of our said lord the king, to the intent that the same pieces of woollen cloth should be exposed to sale, and sold without any further sealing, in deceit of our said lord the king and divers of his subjects, and against the peace, &c.

128. *Indictment at common law for uttering a counterfeit half guinea.*

(*Comm. as in pr. 1.*) One piece of false money, made of base metals, and coloured with a certain wash produc-

(c) *R. v. Edwards*, Trem. 103.

ing the colour of gold, to the likeness and similitude of a piece of good, lawful, and current gold money and coin of this realm called an half guinea, unlawfully, unjustly, and deceitfully did utter and pay to one C. D. for and as a piece of good and lawful gold money and coin of this realm called an half guinea, he the said A. B. then and there well knowing the said piece to be false and counterfeit as aforesaid, to the great damage of the said C. D. and against the peace, &c.

129. *Indictment for selling by false scales.*

That A. B. late of, &c. labourer, on, &c. and from thence until the taking of this inquisition, did use and exercise the trade and business of a shopkeeper, and during that time did deal in the buying and selling, by weight, of divers goods, wares, and merchandizes, to wit, at, &c. and that the said A. B. contriving and intending to cheat and defraud the subjects of our said lord the king, whilst he exercised the said trade and business, to wit, on, &c. at &c. did knowingly, wilfully, and publicly keep in a certain shop there, wherein he carried on his said trade and business, a certain false pair of scales for the weighing of goods, wares, and merchandizes by him sold in the way of his said trade, which said scales were then and there, by artful means, so made and constructed as to cause the goods, wares, and merchandizes weighed therein and sold thereby, to appear of greater weight than the real and true weight, by one eighth part of such apparent weight, and that the said A. B. on, &c. at, &c. well knowing the said scales to be so constructed and made, did knowingly and fraudulently sell to one C. D. (d) a subject of our said lord the king, certain goods in the way of his trade, to wit, a large quantity of flour weighed in and by the said false scales, as and for 100 pounds of flour, whereas in truth and in fact the weight of the said flour so weighed and sold as aforesaid, was short and deficient (e) of the

(d) In Gibbs's case, Str. 497. an indictment, alleging the sale of goods in unlawful measures to *divers faithful subjects to the jurors unknown*, was holden to be sufficient, see p. 176. But it is proper to allege the sale to

a person by name, if he can be ascertained.

(e) In the last-mentioned case the indictment was quashed for not ascertaining the quantity. See p. 184. and the cases there referred to.

said weight of 100 pounds by one eighth part of the said weight of 100 pounds, to wit, at, &c. to the great damage of the said C. D. and against the peace, &c.

130. *Indictment for deception in the sale of wine by bartering and false pretending (f).*

That M. M. late of, &c. gentleman, and A. F. late of the same place, gentleman, being greedy of dishonest gain, and wickedly, falsely, deceitfully, and maliciously intending to defraud T. C. of London, haberdasher, of his monies, goods, and merchandizes, on, &c. at, &c. together deceitfully bargained with the aforesaid T. C. to barter, sell, and exchange a certain quantity of pretended wine as good and true new wine of the kingdom of Portugal, called new Lisbon wine, of him the said A. F. for a certain quantity of hats of him the said T. C. to the value of one hundred and eighteen pounds, of good and lawful money of Great Britain; and upon the bartering, sale, and exchange aforesaid, he the said A. F. took upon himself and pretended to be a merchant of London, and to trade and merchandize as a merchant in wines of the kingdom of Portugal aforesaid, and then and there personated a merchant of London, as if he had been a true merchant of London, when in fact he the aforesaid A. F. never was a merchant of London, nor did he trade or merchandize as a merchant in wines of the kingdom of Portugal, or in any wine whatsoever as a merchant; and upon the bartering, sale, and exchange aforesaid, he the said M. M. took upon himself to be a broker of London, when in fact he the said M. M. at the time of the bartering, sale, and bargaining aforesaid, or at any time afterwards was not a broker of London; and the aforesaid T. C. giving credit to the said fictitious assumptions, personatings, and deceits, did then and there barter, sell, and exchange to the said A. F. and did deliver to him the said M. M. as the broker between the aforesaid T. C. and A. F. a certain quantity of hats, of the value of one hun-

(f) From *Ld. Ray. 1179.* the queen, on the ground of
R. v. Mackarty and Forden- the conspiracy. 2 Burr. 1129.
burgh, it seems that the judg- 6 Mod. 302. East. P. C. 824.
 ment was ultimately given for

dred and eighteen pounds, for (g) ——— of the pretended wine aforesaid; and that the aforesaid M. M. and A. F. upon the bartering, bargaining, and sale aforesaid, did affirm, that the aforesaid pretended wine was true new wine of the kingdom of Portugal aforesaid, called new Lisbon wine, and was the wine of the aforesaid A. F. when in truth and in fact the aforesaid pretended wine was not wine of the kingdom of Portugal, nor was it drinkable or wholesome, nor was it the wine of the aforesaid A. F. to the great deceit and damage of him the said T. C. and against the peace, &c.

131. *Indictment for defrauding a person of a sum of money, by colour of a false and counterfeit letter, and other false tokens, upon the stat. 33 Hen. 8. c. 1. (h).*

That L. P. late of, &c. miller, on, &c. at, &c. falsely

(g) On account of this blank, and not giving a true description of the quality of the wine, &c. the defendants' counsel contended on motion, that the judgment ought to be arrested, but it was affirmed for the queen. 2 Lord Raym. 1179.

(h) The preamble of which recites, that evil disposed persons devising how they might unlawfully get into their possession goods, chattels, and jewels of other persons, have of late, to avoid the punishment of theft, falsely and deceitfully contrived and devised *privy* tokens and counterfeit letters in other men's names*, unto divers persons their special friends and acquaintances, for the obtaining of money,

goods, &c. of the same persons their friends and acquaintances, by colour whereof they have unlawfully obtained the same, ENACTS, that if any person or persons shall falsely and deceitfully obtain, or get into his or their hands or possession, any money, goods, chattels, jewels, or other things, of any other person or persons, by means of any such false token or counterfeit letter, made in any other man's name as aforesaid, and shall be thereof convicted, by witness taken before the lord chancellor, or before the justices of assize, or before the justices of peace of any county, city, borough, town, or franchise in their general sessions, or by action in any of the king's courts of re-

* A mere false affirmation is not within the statute. *R. v. Munn*, Str. 1127. 7 Mod. 315. ? and a written document is not within the act, unless it be made in the name of a third person, and calculated to gain some credit beyond the mere assertion of the defendant. *Lara's case*, 6 T. R. 565. *Wilders's case*. East. P. C. 827.

and deceitfully did pretend and affirm to one T. T. that his the said L. P.'s name was H. H. and that he was the son of H. H. of Newcastle, in the county of Stafford, esq. and nephew to Mr. H. of Newport, in the county of Salop, (meaning J. H. of Newport, clerk,) and that the said L. P. a certain false and counterfeit letter, in the name of him the said J. H. as a true letter of the proper hand-writing of him the said J. H. falsely, fraudulently, and deceitfully to the said T. T., then and there did deliver, (he the said J. H. of Newport, in the county of Salop, clerk, then and long before being the *special* friend and intimate acquaintance of him the said T. T.) by which said false and counterfeit letter it was mentioned (i), that the said J. H. desired the said T. T. to supply the bearer thereof, Mr. H. H. with the sum of sixty guineas, and place it to his account (meaning the account of him the said J. H.) and that the said T. T. then and there believing the said false and counterfeit letter to be of the proper hand-writing of him the said J. H. did then and there pay and deliver to the said L. P. sixty pieces of gold coin, of the proper coin of this kingdom, called guineas, of the value of sixty-three pounds, of lawful money of Great Britain; whereas in truth and in fact the said J. H. never did write or send, or cause to be written or sent, any such letter to the said T. T. desiring the said T. T. to supply the said H. H. with any sum of money whatever: and so the jurors aforesaid, upon their oath aforesaid, do say that the said L. P. on, &c. at, &c. by colour of the said counterfeit letter, and by the said false pretences, unlawfully, falsely, fraudulently, and deceitfully did obtain and get into his hands and possession, of and from the said T. T. the said sum of sixty-three pounds, of lawful money of Great Britain, of the monies of him the said T. T. and the said L. P. the said T. T. of his money aforesaid then and there fraudulently and deceitfully did deceive and defraud, to the great damage and deceit of the said T. T. against the form of the statute, &c. and against the peace, &c.

cord, by process or otherwise, every such offender shall suffer such punishment, by imprisonment, setting upon the pillory, or otherwise by any corporal pain, except pains of

death, as shall be appointed by those before whom he shall be so convict.

(i) Qu. whether the *tenor* should not be set out.

132. *Indictment for obtaining money, by drawing a bill and falsely pretending that W. H. was indebted to the defendant, and would pay the bill (k).*

That A. B. late of, &c. labourer, being an ill-disposed person and common cheat, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud one C. D. of his monies (or of his goods, &c. *as the case is,*) for the support of his profligate

(k) By 30 Geo. 2. c. 24. s. 1. it is enacted, that all persons who, knowingly and designedly by false pretence or pretences, shall obtain* from any person or persons, money, goods, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders against law and the public peace; and the court, before whom such offender or offenders shall be tried, shall, in case he, she, or they shall be convicted of any of the said offences, order such offender or offenders to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or to be transported, as soon as conveniently may be, according to the laws made for transportation of felons, for the term of seven years, as the

court in which any such offender or offenders shall be convicted shall think fit and order.

The stat. 52 G. 3. c. 64. after reciting the stat. 30 G. 2. c. 24. and that it had been deemed expedient to extend its provisions, ENACTS, that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, or from any body politic or corporate, any money, goods, wares, or merchandizes, or any bond, bill of exchange, bank note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods, or other valuable thing, with intent to cheat or defraud any person or persons, or any body politic or

* In general, when *the credit is obtained by the false pretence*, the case falls within this statute. A person was employed to superintend workmen to take an account of their wages, and was at the end of each week supplied with money to pay them, but was not entitled to receive money on account, but merely what was due to the workmen for work done. He delivered in a note of the amount of wages in the common form, but charged a larger sum than the workmen were entitled to, with intent to appropriate the surplus to his own use. And the judges, on the ground above stated, held the case to be within the act. *Mitchell's case*, Gloucester Sp. Ass. 1798. East. P. C. 830. Where goods have been obtained by fraud, the court has no power to award restitution as in cases of felony. 5 T. R. 175 *R. v. De Vaux*, Leach, 666.

way of life (*l*), on &c. with force and arms, at &c. did unlawfully, *knowingly, designedly*, (*m*), and *falsely* (*n*) *pretend* (*o*) to the said G. D. *, that one W. H. was a gentleman of fortune residing at H. in the county of B. and that divers large sums of money were due and owing from the said W. H. to the said A. B. and that the said W. H. would accept and pay, according to the tenor and effect thereof, a certain bill of exchange in writing, then and there drawn by the said A. B. upon the said W. H. and dated the day and year aforesaid, and whereby the said A. B. required the said W. H. to pay to the said C. D. or order, the sum of thirty-one pounds ten shillings, one week after the date thereof, and to place the same to the account of him the said A. B. and then and there delivered the same to the said C. D. by which said false pretences the said A. B. did then and there, to wit, on, &c. knowingly and designedly obtain from the said C. D. a large sum of money, to wit, five pounds ten shillings of the money of the said C. D. with intent then and there to defraud him the said C. D. of the same; whereas (*p*) in truth and in fact the said

corporate, of the same, or shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain any bond, &c. (*as before*) shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished, in like manner as if they had knowingly and designedly, by false pretence or pretences, obtained money, goods, wares, and merchandizes from any person or persons with intent to cheat or defraud any person or persons of the same, or had sent or delivered such letter or writing with a view or intent to

extort money, goods, wares, or merchandizes from the person or persons so threatened.

(*l*) This inducement appears to be unnecessary, since it is no part of the description of the offence.

(*m*) These words are essential to the description of the offence under both the statutes.

(*n*) As to the necessity for this allegation, see p. 96, 97.

(*o*) As to the necessity for setting out the means by which the fraud was effected, see p. 94, 95, 96, 97.

(*p*) It has been lately decided that it is essential to negative, expressly, the truth of those pretences by means of which the property was obtained, and that it is not sufficient to allege, in the words of the statute, that the defendant did, by false pretences, obtain, &c. *R. v. Perrott*, 2 M. & S. 379. 386.

W. H. was not then a gentleman of fortune residing at H. in the county of B. and whereas in truth and in fact there were not then divers large sums of money owing from the said W. H. to the said A. B. and whereas in truth and in fact the said W. H. did not nor would accept the said bill of exchange, and whereas in truth and in fact the said W. H. did not, could not, nor would pay the same bill of exchange when the same became due, according to the tenor and effect of the same bill, or at any other time whatsoever, to the great damage and deception of the said C. D. also against the form, &c. and against the peace, &c.

(2nd Count.) That the said A. B. on, &c. with force and arms, at, &c. contriving and intending, &c. (*as before*) did unlawfully, knowingly, designedly, and falsely pretend to the said C. D. that the said W. H. was a gentleman residing at H. in the county of B. and that the said W. H. would pay a certain other bill of exchange in writing, then and there drawn by the said A. B. upon the said W. H. and dated the day and year last aforesaid, and whereby the said A. B. required the said W. H. to pay to the said C. D. or order, the sum of thirty-one pounds ten shillings, one week after date thereof, and to place the same to the account of him the said A. B. and then and there delivered the same to the said C. D. by which said false pretences, &c. (*state the obtaining of the money, and then negative the pretences, and conclude as in the first count.*)

133. *Under false pretences of being merchants of good fortune, &c.*

(*Commencement as in pr. 132. to the *.*) That the said A. B. then was a merchant of great fortune, who wanted to purchase horses in order to send them abroad, and that he then was a housekeeper at Penge Common, in the county of Kent. And the jurors, &c. that the said A. B. &c. by the *false pretences aforesaid*, did then and there unlawfully, *knowingly*, and *designedly*, obtain from the said C. D. divers *goods and merchandizes*, that is to say, one mare and six geldings of him the said C. D. of great price and value, to wit, of the price and value of one hundred and forty pounds, of lawful money of Great Britain,

with intent then and there to cheat and defraud the said C. D. of the same, whereas in truth and in fact, &c. (*negative the pretences, and conclude as in pr. 132.*)

134. *For obtaining goods from a tradesman, under pretence of being a servant to one of his customers.*

(*Commencement as in pr. 132 to the *.*) That he the said A. B. then was the servant of one E. A. (the said E. A. then and long before being well known to the said C. D. and a customer of the said C. D. in his business and way of trade :) and that he the said A. B. was then sent by the said E. A. to the said C. D. for five yards of superfine woollen cloth ; by which said false pretences the said A. B. did then and there, to wit, on, &c. at, &c. unlawfully, *knowingly*, and *designedly*, obtain from the said C. D. five yards of superfine woollen cloth, of the value of four pounds and fifteen shillings, of the goods, wares, and merchandizes of the said C. D. with intent then and there to cheat and defraud him the said C. D. of the same; whereas in truth and in fact, (*negative the pretences, and conclude as in pr. 132.*)

135. *Indictment against an apprentice for a fraudulent enlistment (q).*

That A. B. late of, &c. being an apprentice bound by in-

(q) By the mutiny act, (see 53 G. 3. c. 17, s. 90.) if any person shall make any false representation of any particular contained in the oaths and certificates mentioned in that statute, before the magistrate, at the time of attestation, for the purpose of obtaining, and shall obtain, any enlisting money or bounty for entering into his majesty's service, or any other money, he shall be deemed guilty of obtaining money under false pretences, within the

stat. 30 G. 2. c. 24. It is also enacted by the first of these stat. that the production of such certificate and proof of the handwriting of the justice of the peace giving such certificate, shall be sufficient evidence of the parties having represented the particulars contained in the oath sworn by him, and specified in the certificate of the justice. This representation states the place of the party's birth, his age, that he does not belong to

indenture (r) to serve one L. M. for a certain term of years, which is yet unexpired, did, without the consent of his master, on, &c. at, &c. cause and procure himself to be enlisted into his majesty's ——— regiment of foot; and that he the said A. B. did then and there, upon his attestation before C. D. esquire, then being one of his majesty's justices assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, within the said county committed, at the time of the attestation of him the said A. B. there before the said magistrate, unlawfully, knowingly, designedly, and falsely represent and pretend; that he the said A. B. was not then an apprentice, for the purpose of obtaining a bounty for entering into the service of our said lord the king; and did then and there, by means of such false representation and pretence, unlawfully, knowingly, and designedly, obtain from ———, then paymaster of his majesty's ——— regiment of foot, the sum of 12 pounds, as and for such bounty-money; whereas in truth and in fact the said A. B. at the time of such attestation, then and there was and still is an apprentice, bound by indenture to serve L. M. for the then remainder of a term of seven years, of which term five years were then unexpired, to wit, at, &c. against the form of the statutes, &c. and against the peace, &c. (*In another count allege an intention to defraud the king (s).*)

136. *Indictment for fraudulently winning money at dice (t).*

(*Comm. as in pr. 1.*) By fraud, shift, cozenage, circumvention, deceit, unlawful device, and ill practice, in playing with dice, that is to say, in playing at a certain

any other regiment, or to his majesty's navy or marines, that he has the perfect use of his limbs and hearing, and is not an apprentice. 53 G. 3. c. 17. s. 147.

(r) The indentures must be proved by the subscribing witness. *R. v. Jones, Leach*, 208.

(s) See *R. v. Jones, Leach*, 208. East. P. C. 822.

(t) By stat. 9 Ann. c. 14. s. 5. if any person or persons shall, by any fraud or shift, cozenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or at

game called hazard, and by then and there fraudulently slurring the dice (*u*), did win, obtain, and acquire to himself, —————, of lawful money of Great Britain, of the monies of one C. D. of and from him the said C. D. in and by playing with him the said C. D. at dice, to the great damage of the said C. D. against the form, &c. and against the peace, &c.

137. *Indictment for winning above ten pounds at cards, at one time and sitting (x).*

That A. B. late of, &c. gentleman, on, &c. at the pa-

any the games aforesaid*, or in or by bearing a share or part in the stakes, wages, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire, to him or themselves, or to any other or others, any money or other valuable thing or things whatsoever, or shall, at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of £10; and be convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, he or they shall forfeit five times the value of the money or other thing so won as aforesaid; and in case of such ill practice as aforesaid shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such pe-

nalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid.

(*u*) It seems to be necessary to set out the particular means of fraud.

(*x*) By stat. 18 Geo. 2. c. 34. s. 8. it is enacted, That if any person shall win or lose at play, or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours, the sum or value of twenty pounds; such person shall be liable to be indicted for such offence within six months after it is committed, either before his majesty's justices of the king's bench, assize, gaol delivery, or grand sessions; and being thereof legally convicted, shall be fined five times the value of the sum so won or lost; which fine (after such charges as the court shall judge reasonable allowed

* Cards, dice, tables, tennis, bowls, or other game or games whatsoever.

A foot-race is a game within this statute; and one person running alone (against time) is within the meaning of it, &c. *Brown v. Berkeley*, Cowp. 281. Vide *Lynall v. Longbotham*, 2 Wils. 36. So as to horse-racing. *Goodburn v. Marley*, 2 Stra. 1159. Vide also Lord Raym. 87. 452. 1034.

risk (y) of ———, in the county of ———, did, by gaming and playing at cards with C. D. gentleman, win, at one time and sitting, above the sum of ten pounds, that is to say, the sum of four hundred and twenty pounds. And the jurors aforesaid, upon their oath aforesaid, do further present, That the said A. B. afterwards, to wit, on, &c. in the parish above mentioned, in the county aforesaid, did receive (z), obtain, and procure to himself of the said C. D. but from and by the hands of E. F. as agent or servant to the said C. D. for and in satisfaction of the said four hundred and twenty pounds so won as aforesaid, the sum of four hundred and twenty pounds, of lawful money of Great Britain, to the great damage of the said C. D. against the form of the statute, &c. and against the peace, &c.

2nd count. That the said A. B. on, &c. at, &c. did, by gaming and playing at cards with C. D. gentleman, win, obtain, and acquire to himself, of and from the said C. D. at one time and sitting, above the sum of ten pounds, that is to say, the sum of four hundred and twenty pounds, of and from the said C. D. (*Conclude as before.*)

to the prosecutors and evidence out of the same) shall go to the poor of the parish or place where such offence shall be committed.

s. 9. Provided that if any person so offending shall discover any other person so offending, so that such person shall be thereupon convicted, the person so discovering shall be discharged, and indemnified from all penalties, by reason of any such offence, if such person so discovering hath not been before convicted thereof, and shall be admitted as an evidence to prove the same.

See statutes 2 G. 2. c. 28.

12 Geo. 2. c. 28. 25 Geo. 2. c. 36. s. 5. and 16 Car. 2. c. 7.

(y) The offence should be laid to have been committed within a parish, since the fine is given to the poor of such parish. See *Lookup's case*, Burr. 2018. where, in a *qui tam* action under this statute, the defect was holden to be cured by a verdict, which found that the defendant did owe, &c. to the poor of a particular parish. And see Mr. J. Buller's observation, 4 T. R. 227.

(z) This special allegation of the receipt from the agent does not appear to be necessary.

FORGERY (a).

(a) Forgery is punishable as a misdemeanor at common law, and in a great variety of instances, as a capital felony, by virtue of different statutes. Mr. J. Blackstone, 4 Comm. 247. defines it to be the fraudulent making or alteration of a writing to the prejudice of another man's right. Mr. Baron Eyre, in Taylor's case, East. P. C. 853. defined it to be a false signature made with intent to deceive; but this definition does not expressly comprehend the cases where the forgery consists in the altering a valid instrument with a fraudulent intention. In the case of Parkes and Brown, 2 Leach, 898. it was defined, by Mr. J. Grose, to be "*the false making of a note or other instrument with intent to defraud.*"

1. With respect to the *false making*, these words, with great propriety, include every fraudulent and material alteration of an instrument already existing, whether by diminution, addition, transposition, or any combination of these practices, for in each of these instances, a new and false instrument is created, and such practices are as much within the mischief of the offence, and frequently even more so, than if the whole instrument had been fabricated; and, therefore, the alteration of the figures in a bill of exchange, so as to make a larger

sum payable, or of the date, so as to make the same sum payable at an earlier period, 4 T. R. 320. or the fraudulent application of a genuine signature to a false instrument, Puckering's case, 1 And. 100. Teague's case, East. P. C. 979. amounts to a forgery, see 3 Ins. 169. 170. 1 Hale, 683. Str. 18. Dawson's case, East. P. C. 978. 3 P. Wms. 419. Kinder's case, East. P. C. 855. But there must be a *false making*, that is, some false signature or alteration of an existing instrument; and, therefore, where a defendant offered in payment a bill of exchange which was made payable to Barnard M'Carty, and which had been indorsed by Barnard M'Carty, and falsely asserted that his name was Barnard M'Carty, and that the indorsement was his, upon which representation the person to whom it was offered took the bill in payment, it was holden by all the judges, that the offence did not amount to forgery, since there was no false indorsement, *R. v. Hevey*, Leach, 268. East. P. C. 856. But it is not necessary that the false making should be in another man's name, though it seems to have been formerly so considered. Lewis's case, Fost. 117. 1 Haw. c. 70. s. 2.

Where the offence consists in the false making of an in-

strument, in resemblance of another genuine instrument, it is not essential that the resemblance should be complete in every respect, it is sufficient if it be strong enough to effect the particular fraud, and to prevail over that degree of caution, prudence, and discretion, which ought to be used in the usual course of affairs; and, therefore, though the word *pounds* and the watermark words, *Bank of England*, were omitted in the body of a forged bank note, the paper of which was thicker than ordinary, yet as it resembled a true note in other respects, it was holden to be sufficient to support the charge. *Elliot's case*, Leach, 210.

So in *Hoost's case*, Ex. Sp. Ass. 1802, cor. Le Blanc, J. East. P. C. 950. where it appeared that several persons had been deceived by the counterfeited notes in question, though a person from the bank stated, that he could not have been imposed upon by the counterfeits, the learned judge was of opinion, that the resemblance was strong enough to support the indictment, since it was sufficient to impose upon persons in general, though not upon one of particular experience. So it is not essential that the instrument should be stamped, though without a stamp it could (though genuine) have no legal operation. See p. 102. and the cases there referred to, and *R. v. Fitzgerald and Lee*, Leach, 24. East. P. C. 953.

Neither is it requisite, that

the instrument, if genuine, should be operative and available, see p. 110. 111. and the cases there referred to; but, if the instrument be intrinsically defective and illegal, no indictment can be maintained upon it. See p. 108. 109. and *Jones's case*, Leach, 243. East. P. C. 883. where the note was set forth as purporting to be a bank note, and ran thus,—“ I promise to pay, for self and company, of *my bank in England*,” and the court of K. B. held, that the prisoner was entitled to an acquittal. See also *Coydu's case*, *Murphy's case*. Starkie on Ev. vol. ii. tit. Forgery.

So, in *Wall's case*, East. P. C. 953. it was holden, that a person could not be guilty of forging a will of land, purporting to be attested by two witnesses only, since such a will is void by the express enactment of the stat. of frauds, 29 Car. 2. c. 3. s. 5.

2. *A note or other instrument.*

It has been doubted whether, at common law, the offence of forgery could be committed by the false making of any instrument which might prejudice another, 1 Haw. c. 70. s. 8, 9, 10. East. P. C. 859. 2 Str. 747. *Ld. Ray.* 1461. But, clearly, it extended to the false making of records, and of all instruments of a public nature, such as a parish register, a privy seal, a licence from the barons of the exchequer to compound a debt, &c. and to private deeds and instruments not under seal, 1 Haw. c. 70. s. 9, 10. And many instances are to be found

of indictments for forging instruments not under seal, such as a bill of exchange, Roll. 35. an acquittance. *R. v. Fervers*, 1 Sid. 278. Trem. 129. a warrant of attorney, Ray. 81. a bill of lading, 5 Mod. 137. 1 Salk. 342. 371. See 2 Str. 747. 2 Ld. Ray. 1461. *R. v. Ward*, where it was holden, that the forging an order with intent to avoid the delivery of certain goods mentioned in a schedule, was forgery at common law, though the fraud was not effected. And in *Leander Fawcett's case*, East. P. C. 862. it was holden, that the forging an order of discharge by his creditor, by one who was committed to gaol under an attachment for a contempt in a civil cause, by means of which he obtained his discharge, was at all events a misdemeanor at common law, although the order was a mere nullity, since the attachment had not been issued for non-payment of money; and a great majority of the judges held, that it was indictable as a forgery at common law.

But there are few cases in which a forgery can be committed likely to prejudice the public, or even a private individual to any serious extent, which has not been provided against by one or more of the numerous statutes which have been levelled against this offence; to some of the principal ones the reader is referred below.

3. An intention to defraud another is of the very essence of this offence at common law, and seems to form part of the

definition of it in the several statutes, which prohibit and more severely punish particular branches of it. But it is by no means necessary, that any prejudice should actually result from the forgery. 2 Str. 747. 2 Ld. Ray. 1461.; it is sufficient, if another party may be prejudiced. An intent to defraud must be averred, see p. 111. 112. 180.; but it may be averred generally, without specifying the means. *Id.* It must, however, be proved as it is alleged. *Id.* It has been holden, that it is no objection to a special verdict, that the forgery was not found to have been committed for the sake of gain or of fraud. *Ward's case*, Ld. Ray. 1466.

As to the forgery of deeds, wills, securities, receipts, orders for money, &c. or uttering of the same, to defraud any person or corporation, see the stat. 45 G. 3. c. 89. s. 1. 2 G. 2. c. 25. 7 G. 2. c. 22. 15 G. 2. c. 13. 41 G. 3. c. 39.; of drafts on the receiver-general of the customs, see stat. 46 G. 3. c. 150.; of drafts, &c. of public offices, stat. 46 G. 3. c. 45. 75. 76. 83. 142. 150. 50 G. 3. c. 65, s. 18. 51 G. 3. c. 15. 52 G. 3. c. 143.; of receipts for contributions under the Loan Acts, 41 G. 3. U. K. c. 3. s. 24.; of contracts for the redemption of the land-tax, stat. 42 G. 3. c. 116. 194. 50 G. 3. c. 65. 51 G. 3. c. 15.; of lottery tickets, stat. 44 G. 3. c. 93. s. 11.; of paper for bank notes, or engraving bank notes without authority, stat. 45 G. 3. c. 89. 52

138. *Indictment for forging an indenture of bargain and sale, and a release of another's freehold estate in right of his wife, upon stat. 5 Eliz. ch. 14 (b).*

That J. G. gent. and E. his wife, in right of her the

G. 3. c. 138.; of dollars or tokens of the Bank of England or Ireland, stat. 45 G. 3. c. 42. s. 1.; of foreign bills of exchange, stat. 43 G. 3. c. 139. s. 1. 3.; of debentures for teas exported to Ireland, stat. 41 G. 3. c. 75. s. 7.; of excise certificates, stat. 41 G. 3. c. 91. s. 5.; of franks, stat. 43. G. 3. c. 28.; of certificates or debentures under the Annuity Act, 53 G. 3. c. 41. s. 26. 27.; of transfers under acts for improving the land revenues of the crown, 54 G. 3. c. 78. s. 38.; of certificates of pensioners of Greenwich Hospital, a false presentation of, 54 G. 3.; of bill of exchange, &c. in the name of the agent-general, 54 G. 3. c. 151. s. 16.

(b) By the st. 5 Eliz. c. 14. s. 2. if any person or persons, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely, forge or make, or subtilly cause or wittingly assent to be forged or made, any false deed, charter, or writing sealed, court-roll, or the will of any person or persons, in writing, to the intent that the estate of freehold or inheritance of any person or persons, of, in, or to any lands, tenements, or hereditaments, freehold or co-

pyhold, or the right, title, or interest of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged, or shall pronounce, publish, or show forth in evidence, any such false and forged deed, charter, writing, court-roll, or will, as true, knowing the same to be false and forged, as is aforesaid, to the intent above remembered, "except being an attorney, lawyer, or counsellor, he shall for his client plead, shew forth, or give in evidence such false and forged deed, &c. to the forging whereof he was not party or privy," and shall be thereof convicted, either upon action or actions of forgery or false deeds to be founded upon the said statute, at the suit of the party grieved, or otherwise, according to the order and due course of the laws of this realm, &c. shall pay unto the party grieved his double costs and damages, to be found or assessed in that court where such conviction shall be, and also shall be set upon the pillory in some open market, or other open place, and there have both his ears cut off, and also his nostrils slit and cut, and seared with a hot iron, &c. and shall for-

said E. on the ———, &c. and long before, were, and continually from thence hitherto have been, and still are,

feit to the king the whole issues and profits of his lands and tenements, and suffer perpetual imprisonment, &c.

By sec. 3. if any person, upon his own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly, and falsely forge or make, or cause or assent, &c. any false charter, deed, or writing, to the intent that any person shall or may have or claim any estate or interest, for term of years, of, in, or to any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee simple, fee tail, or for term of life, lives, or years; or shall, as is aforesaid, forge, make, &c. any obligation or bill obligatory, or any acquittance, release, or other discharge, of any debt, accompt, action, suit, demand, or other things personal; or shall pronounce, publish, or give in evidence (except as is before excepted) any such false and forged charter, &c. as true, knowing the same to be false and forged, and shall be thereof convicted by any of the ways or means aforesaid, he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court where the said conviction shall be had, and shall be also set upon the pillory in some open market-town, or other open place, and there have one

of his ears cut off, and also shall suffer imprisonment for one year, &c.

By s. 7, 8. it is further enacted, that if any person so convicted or condemned of any of the offences aforesaid, shall, after any such his conviction or condemnation estoons, commit or perpetrate any of the said offences, in form aforesaid, that then every such second offence shall be adjudged felony without benefit of clergy, saving to all persons, other than the said offenders, and such as claim to their uses, all such rights, &c. which they shall have to any the hereditaments of any such person, so as is aforesaid convicted or attainted, at any time before, &c. saving also the dower of such offender's wife, and the right of his heir.

Sect. 10. further enacts, that all justices of oyer and terminer, and justices of assize, shall have power to inquire of, hear, and determine the offences aforesaid.

Sect. 9. 12. and 16. provide, that this act shall not extend to any ordinary, or his commissary, &c. for putting their seal of office to any will to be exhibited unto them, not knowing the same to be false or forged, or for writing of the said will, or prohibiting of the same; nor to any proctor, &c. for the writing or pleading of any proxy made according to

seised in their demesne as of fee of and in certain messuages, lands, and tenements, called Jawick, with their appurtenances, in the parish of Clackton, in the county of Essex, to wit, at, &c. and that J. C. late of London, merchant, being a person of evil name and fame, and of a wicked disposition, and contriving and intending the said J. G. and E. his wife, unjustly to aggrieve, and with an intent that the state of freehold of them the said J. G. and E. of and in the said lands, tenements, and hereditaments, called Jawick, in the parish of Clackton, in the county of Essex aforesaid, and the right, title, and interest of the said J. and E. of and in the same, should be molested and troubled, afterwards, to wit, on, &c. at, &c. upon his own head and imagination, with force and arms, &c. wittingly, subtilly, and falsely, did forge and make, and caused to be forged and made, a certain false writing, sealed, purporting to be sealed and delivered by the said J. G. and E. and in itself purporting to be an indenture of bargain and sale for one year, and to bear date on, &c. and supposed to be made between them the said J. and E. by the names of J. G. of the city of Gloucester, gentleman, and E. his wife, of the one part, and the aforesaid J. by the name of J. C. of London, merchant, of the other part: in which said indenture is mentioned and supposed in substance (among other things), "That for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said J. G. and E. his wife, in hand paid by the said J. C. at or before the sealing and delivery of the same indenture, the receipt whereof the said J. G. and E. his wife thereby are mentioned to have acknowledged, they the said J. G. and E. his wife had granted, bar-

the ecclesiastical law, &c. for the appearance of any person being cited to appear in such court; nor to any archdeacon or official, for putting their authentic seal to the said proxy or proxies; nor to any ecclesiastical judge, for admitting of the same; nor to any person who shall plead or shew forth

any deed or writing exemplified under the great seal of England, or under the seal of any other authentic court of this realm; nor to any person who shall cause any seal of any court to be set to any such deed, charter, or writing enrolled, not knowing the same to be false or forged.

gained, and sold, and by the same indenture have granted, bargained, and sold unto the said J. C. all that park, commonly called or known by the name of Jawick Park, in the parish of Clackton, in the county of Essex, (*setting out the description of the premises*) to have and to hold the said park, trees, woods, underwoods, deer, hereditaments, and appurtenances, thereby bargained and sold, or meant, mentioned, or intended so to be, and every part thereof, unto the said J. C. his executors, administrators, and assigns, from the day next before the day of the date of the same indenture, for and during, and until the full end and term of one whole year from thence next following, and fully to be compleat and ended, yielding and paying therefore, upon the last day of the said term thereby granted, the rent of one pepper-corn, if the same should be lawfully demanded, to the intent and purpose that by virtue thereof, and of the statute for transferring uses into possession, the said J. C. might be in actual possession of all and singular the said premises thereby granted, bargained, and sold, or meant or intended so to be, and thereby might be enabled to receive and take the grant and release, reversion and inheritance thereof, to the use of himself, his heirs, and assigns, for ever: to the great damage of the said J. G. and E. his wife, against the form, &c. and against the peace, &c.

(*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, That the said J. C. contriving and intending the said J. G. and E. his wife as aforesaid unjustly to aggrieve, and with the said intent, that the state of freehold of them the said J. and E. in right of the said E. of and in the said lands, tenements, and hereditaments, and the right, title, and interest of them the said J. and E. of and in the same, should be molested and troubled, on, &c. at, &c. upon his own head and imagination, with force and arms wittingly, subtilly, and falsely, did forge and make, and caused to be forged and made, one other false writing, sealed, in itself purporting to be an indenture of release, and to bear date on the twenty-second day of September, in the said first year of the reign of our said lord the now king, and supposed to be made between them the said J. G. and E. his wife, by the names of J. G. of the city of Gloucester, gent. and E. his wife of the one part, and the said J. C. by the name of J. C. of London, merchant, of the other part, in

which said indenture of release is mentioned and supposed in substance (among other things), "That for and in consideration of the sum of four thousand and five hundred pounds, of lawful money of Great Britain, to the said J. G. and E. his wife, in hand paid by the said J. C. at or before the sealing and delivery of the said indenture of release, the receipt and payment whereof the said J. G. and E. his wife by the same indenture of release are mentioned to have acknowledged, and of the same and every part thereof to have acquitted, exonerated, and discharged, the said J. C. his heirs, executors, administrators, and assigns, and every of them thereby, they the said J. G. and E. his wife had granted, bargained, sold, aliened, released, and confirmed, and by the same indenture of release, have granted, bargained, sold, aliened, released, and confirmed, to the said J. C. as by the same indenture is supposed (in his actual possession then being by virtue of a bargain and sale to him thereof made and granted by the said J. G. and E. his wife, in consideration of five shillings, by indenture bearing date the day next before the day of the date of the same indenture of release, for one whole year, to begin from the day next before the day of the date of the said indenture of bargain and sale, and mentioned to be executed before the supposed sealing and delivery of the same indenture of release, and by force of the statute for transferring uses into possession,) to his heirs and assigns for ever, all that park, commonly called or known by the name of Jawick Park, in the parish of Clackton, in the county of Essex, (*setting out the premises as before,*) and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, property, claim, and demand, whatsoever, as well in law as in equity, of them the said J. G. and E. his wife, of, in, to, or out of the said park and premises, and every part and parcel thereof; and also all deeds, evidences, muniments, escripts, and writings, belonging, touching, or in any wise concerning the same lands, hereditaments, and premises, or any part thereof, to have and to hold the said park, trees, woods, underwoods, deer, hereditaments, and appurtenances, thereby granted and released, or meant, mentioned, or intended so to be, and every part thereof, to the said J. C. his heirs and assigns, and to the only proper use, benefit, and behoof of the said J. C. and his heirs and assigns," to the great damage of the said J. G. and E. his wife, to the evil example of all others in the like case offending, against the

form, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. C. being a person of evil name and fame, and of a wicked disposition, and contriving and intending the said J. G. gentleman, and E. his wife, unjustly to aggrieve, and with an intent that the state of freehold of them the said J. and E. G. in right of the said E. of and in certain lands, tenements, and hereditaments, called Jawick, in the parish of Clackton, hereinbefore mentioned, in the county of Essex, and the right, title, and interest of the said J. and E. of and in the same, should be molested and troubled, on, &c. with force and arms, at, &c. falsely did pronounce and publish one false, forged writing, sealed, purporting to be sealed and delivered by the said J. G. and E. his wife, as a true writing, he the said J. C. knowing that writing to be a false, forged, and counterfeited writing, the same writing in itself purporting to be an indenture of bargain and sale for one year, and to bear date on the twenty-first day of September, in the said first year of the reign of our said lord the now king, and to be made between the said J. and E. by the names of J. G. of the city of Gloucester, gentleman, and E. his wife of the one part, and the said J. C. by the name of J. C. of London, merchant of the other part; in which same last-mentioned indenture of bargain and sale is mentioned and supposed in substance (among other things,) that for *(set out the indenture of lease as in the first count,)* (he the said J. C. at the said time that he the said J. C. as aforesaid did publish and pronounce the said false forged writing, as a true writing, well knowing that writing to be falsely forged,) to the great damage of the said J. G. and E. his wife, to the evil example of all others in the like case offending, against the form, &c. and against the peace, &c. *(Fourth count for publishing the release.)*

139. *For forging (c) a bank of England note, and uttering the same.*

Lancashire to wit. That J. B. late of, &c. labourer,

(c) The stat. 15 Geo. 2, c. 13. s. 11. enacts, that if any person or persons shall forge, counterfeit, or alter, any bank note, bank bill of exchange, dividend warrant, or any bond

heretofore, that is to say, on, &c. with force and arms; at &c. feloniously did *forge and counterfeit (d) a certain bank*

or obligation, under the common seal of the said company, (i. e. Bank of England,) or any indorsement thereon, or shall offer, or dispose of, or put away any such forged, counterfeited, or altered note, &c. or the indorsement thereon, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any of their officers or servants, knowing such note, &c. to be forged, counterfeited, or altered, with intent to defraud the said company or their successors, or any other person or persons whatsoever, every person or persons so offending, and being thereof convicted, in due form of law, shall be deemed guilty of felony without benefit of clergy.

By 13 Geo. 3. c. 79. making or knowingly having in possession, instruments for making paper, with the words "Bank of England," visible in the substance of it, is a capital felony. Engraving notes, &c. with like words, or with the sums in white letters on black ground, or knowingly having such in possession, or altering, &c. subject to imprisonment, 41 Geo. 3. (U. K.) c. 39.—Making, or having in possession without authority, any instrument for making paper, of the sort therein described, with curved bar lines, or the sums appearing in the substance of the paper, or procuring the numerical sum of any bank note,

&c. to appear visible in the substance of the paper, &c. felony, and transportation for fourteen years.

41 Geo. 3. c. 39. knowingly receiving, or having in possession, forged bank notes, &c. without lawful excuse, felony, and transportation for 14 years. Engraving, &c. on plate, &c. any bank note, &c. &c. purporting to be of the Bank of England, or using such plate, &c. or knowingly having such in possession, without written authority, or uttering, &c. felony and transportation for seven years.

The st. 45 G. 3. c. 89. s. 2. enacts, that if any person or persons shall *forge, counterfeit, or alter*, any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the governor and company of the Bank of England, or any indorsement thereon, or shall offer, or dispose of or put away, any such forged, counterfeit, or altered note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any of their officers or servants, knowing such note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said governor and company, or their

note (e), the tenor (f) of which said forged and counterfeited bank note is as followeth, that is to say, (the note is here set out verbatim (g),) with intent (h) to defraud the governor and company of the bank of England, against the form of the statute, &c. and against the peace, &c.

(2nd Count.) That the said J. B. heretofore, that is to say, on, &c. with force and arms, at, &c. did dispose of and put away (i) a certain forged and counterfeited bank note, the tenor of which said last-mentioned forged and counterfeited bank note is as followeth, that is to say, (the note) with intent to defraud the governor and company of the

successors, or any other person or persons, body or bodies politic or corporate whatsoever, every person or persons so offending, and being thereof convicted, in due form of law, shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy.

By sec. 3. of the same stat. if any unauthorised person shall make use, &c. or have in possession, without lawful excuse, (the proof whereof shall lie on the party accused,) any frame, mould, or instrument for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waved or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of such paper; or who shall make, use, or vend, &c. the same, or shall knowingly have such in possession, or shall cause or procure the numerical sum or amount of any bank note, &c. in any word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or

printed, he shall be adjudged a felon, and shall be transported for the space of 14 years.

(d) These are the words of the statute; it is unnecessary to allege that he did *falsely* forge and counterfeit, see p. 98. This count is framed upon the stat. 45 G. 3. c. 89. s. 2.

(e) It is essential to shew, that the instrument forged is of the description prohibited by the stat. see p. 104. As to the averments which are necessary, when the forged writing does not purport to be of the kind prohibited, see p. 104.

(f) As to the words by which the instrument is usually introduced, see p. 100. *Lyon's case*, Leach, 696.

(g) As to the accuracy with which the forged writing should be set out, see p. 100. 102. 103.

(h) See p. 111. 112. 180. as to the general necessity for averring an intent to defraud, in case of perjury, the form of the averment, and the effects of variance.

(i) According to the words of the act, 45 G. 3. c. 89. s. 2,

bank of England; he the said J. B. at the said time of his so disposing of and putting away the said last-mentioned forged and counterfeit bank note, then and there, to wit, on, &c. at, &c. well knowing such last mentioned note to be forged and counterfeited, against the form of the statute, &c. and against the peace, &c.

(3rd Count.) (k) Feloniously, did *falsely make, (l) forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain promissory note* for the payment of money, the tenor of which said last mentioned false, forged, and counterfeited note is as followeth, that is to say, (*note as before,*) with intention to defraud the governor and company of the bank of England, against the form (m) &c. and against the peace, &c.

(k) This count is framed upon the stat. 45 G. 3. c. 89. which supersedes the stat. 2. G. 2. c. 25. the operation of which was extended to the protection of corporations by the stat. 31 G. 2. c. 22. s. 78.

(l) See the words of the statute.

(m) By the stat. 2 G. 2. c. 25. made perpetual by the st. 9 G. 2. c. 18. if any person shall *falsely make, forge, or counterfeit, or cause or procure to be falsely made, &c. or willingly act or assist in the false making, &c.* any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of any bill of exchange or promissory note for payment of money, or any acquittance or receipt either for money or goods, with intent to defraud any person whatsoever, (and by stat. 31 G. 2. c. 22. s. 78. with

intent to defraud any corporation whatsoever, or shall *utter or publish as true, any false, forged, or counterfeited deed, &c.* with intent to defraud any person or corporation,) knowing the same to be false, forged, and counterfeited, every such person, being thereof lawfully convicted, shall be deemed guilty of felony without benefit of clergy.

The stat. 7 G. 2. c. 22. made to supply the defects of the former acts, which it recites, and reciting farther that no punishment is inflicted by the said act on such as commit the offences therein after set forth, enacts, that “if any person shall *falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, &c. or willingly act or assist in the false making, &c.* any acceptance of any bill of exchange, or the number or principal sum of any accountable

(4th Count.) Feloniously did *dispose of and put away*(n), a certain false, forged, and counterfeited promissory note for the payment of money, the tenor of which said last-mentioned false, forged, and counterfeited

receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money or delivery of goods, with intent to defraud any person whatsoever, (and by stat. 18 G. 3. c. 18. with intent to defraud any corporation,) or shall utter or publish as true, any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt, for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention to defraud any person (or corporation) knowing the same to be false, altered, forged, or counterfeited, then every such person being thereof lawfully convicted, shall be deemed guilty of felony without benefit of clergy.

In the stat. 7 G. 2. there is no express saving of corruption of blood, as in the others, and by s. 4. of the stat. 2 G. 2. c. 25. the act is not to extend to Scotland.

The st. 45 G. 3. c. 89. after noticing the st. 2 G. 2. c. 25. 7 G. 2. c. 22. 31 G. 2. c. 22. 15 G. 2. c. 22. 41 G. 3. c. 39. and reciting that it is expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein, as are

hereby made, enacts, that if any person or persons shall *falsely make, forge, counterfeit or alter*, or cause, or procure to be falsely made, counterfeited, or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt, either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant, or order for payment of money, or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever, or shall *offer, dispose of, or put away*, any false, forged, counterfeited, or altered deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment, of any bill of exchange, or promissory note for payment of money, acceptance of any bill of exchange, acquittance, or receipt, either for money or goods, accountable receipt for any note, bill, or other security for pay-

note is as followeth, that is to say, (*note as before,*) with intent to defraud the governor and company of the bank of England, he the said J. B. at the said time of his so disposing of and putting away the said last-mentioned false, forged, and counterfeited note, then and there, to wit, on, &c. at, &c. well knowing the same last-mentioned note to be false, forged, and counterfeited, against the form, &c. and against the peace, &c.

(5th Count.) Feloniously did forge and counterfeit a certain other bank note, the tenor of which said last-mentioned forged and counterfeit bank note is as followeth, that is to say, (*note as before,*) with intent to defraud one J. S. against the form, &c. and against the peace, &c.

(6th Count.) Feloniously did dispose of and put away, a certain other forged and counterfeited bank note, the tenor of which said last-mentioned forged and counterfeited bank note is as followeth, that is to say, (*note as before,*) with intent to defraud the said J. S. he the said J. B. at the time of his so disposing of and putting away the said last-mentioned forged and counterfeited bank note, then and there, to wit, on, &c. well knowing such last-mentioned note to be forged and counterfeited, against the form, &c. and against the peace, &c.

(7th Count.) Feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain other promissory note for the payment of money, the tenor of, which said last-mentioned forged and counterfeited note, is as followeth, that is to say, (*note as before,*) with intention to defraud the said J. S. against the form, &c. and against the peace, &c.

(8th Count.) Feloniously did dispose of and put away, a certain other false, forged, and counterfeited pro-

ment of money, warrant, or order, for payment of money, or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited, or altered, then every person or persons so offending,

and being thereof lawfully convicted, according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

(n) See the stat. 45 G. 3. c. 89. in the preceding note.

missory note for payment of money, the tenor of which said last-mentioned false, forged, and counterfeited note is as followeth, that is to say, (*note as before,*) with intention to defraud the said J. S. the said J. B. at the said time of his so disposing of and putting away the said last mentioned false, forged, and counterfeited note, then and there, to wit, on, &c. well knowing the same last-mentioned note to be false, forged, and counterfeited, against the form, &c. and against the peace, &c.

140. *For having in possession forged bank of England notes without lawful excuse, knowing the same to be forged (o).*

(Commencement as in pr. 1.) *Feloniously, knowingly, and wittingly, and without lawful excuse,* had in his possession and custody, divers forged and counterfeited bank notes, that is to say, one forged and counterfeited bank note, the tenor of which said forged and counterfeited bank note is as followeth, that is to say, (*here the note is set out,*) and one other forged and counterfeited bank note, the tenor of which said last-mentioned forged and counterfeited bank note is as followeth, that is to say, (*here the other note is set out,*) he the said A. B. then and there, to wit, on, &c. at, &c. well knowing the same notes to be forged and counterfeited, against the form of the statute, &c. and against the peace, &c.

(o) See the stat. 41 G. 3. c. 39. supra. By the stat. 45. G. 3. c. 89. s. 6. it is enacted, that if any person or persons shall purchase, or receive from any other person or persons, any forged or counterfeited bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited, or shall knowingly or wittingly have in his, her, or their possession or custody, in his, her, or their dwelling-house, out-

house, lodgings, or apartment, any forged or counterfeited bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged and counterfeited, without lawful excuse, (the proof whereof shall lie upon the person accused,) every person or persons so offending, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of 14 years.

(*2nd Count.*) Feloniously, knowingly, wittingly, and without lawful excuse, had in his possession and custody a certain other forged and counterfeited bank note, the tenor of which said last-mentioned forged and counterfeited bank note is as followeth, that is to say, (*the first note in the preceding count is here set out again,*) he the said A. B. then and there, to wit, on, &c. at, &c. well knowing the same last-mentioned note to be forged and counterfeited, against the form of the statute, &c. and against the peace, &c.

141. *Indictment for forging, &c. a bill of exchange, an acceptance thereof, and an indorsement thereon.*

(*Comm. as in pr. 1.*) (*p*) Feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting,* a certain bill of exchange; the tenor of which said false, forged, and counterfeited *bill of exchange* is as follows, that is to say (*q*),

No. £54. 1s.

Bristol, America, 17th Sept. 1797.

Three months after sight pay to Messrs. S. R. and Son, or order, fifty-four pounds one shilling, value received.

A. M.

To Mr. R. G.

Old Change,
London.

with intention (*r*) to defraud A. S. against the form, &c. and against the peace, &c.

(*Second count for uttering, &c. (s).*) Feloniously did utter and publish as true a certain false, forged, and counterfeited bill of exchange; which said last-mentioned false, forged, and counterfeited bill of exchange is as follows, that is to say, (*set out the bill as before,*) with intention to defraud the said A. S. (he the said A. B. at the said time he so uttered and published the said last-mentioned false, forged, and counterfeited bill of ex-

(*p*) See the stat. 2 G. 2. c. 25. 7 G. 2. c. 22. 45 G. 3. c. 89. p. 514, 515.

(*q*) See p. 42, 43.

(*r*) See p. 111, 112.

(*s*) See the st. 2 G. 2. c. 25. 45 G. 3. c. 89. see p. 514, 515.

change as aforesaid, then and there, to wit, on, &c. at, &c. well knowing the same to be false, forged, and counterfeited, against the form, &c. and against the peace, &c.

(*Third count (t). for forging an acceptance.*) That the said A. B. having in his possession a certain other bill of exchange (u), whose tenor follows, that is to say, (*set out the bill,*) * on, &c. with force and arms, at, &c. feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting, on the said last-mentioned bill of exchange,** an acceptance of the said last-mentioned bill of exchange, to the tenor following, that is to say, *Accepted, R. G. Nov. 13th*, with intent to defraud the said A. S. against the form, &c. and against the peace, &c.

(*Fourth count, for uttering a forged acceptance, as in the last count to the *.*) On which said last-mentioned bill of exchange was written a certain false, forged, and counterfeited acceptance of the said last-mentioned bill of exchange, whose tenor follows, that is to say, *Accepted, R. G. Nov. 13th*, on, &c. with force and arms, at, &c. feloniously did utter and publish as true the said last-mentioned false, forged, and counterfeited acceptance of the said last-mentioned bill of exchange, with intent to defraud the said A. S. (he the said A. B. at the time of uttering and publishing as true the said last-mentioned false, forged, and counterfeited acceptance of the said last-mentioned bill of exchange, then and there, to wit, on, &c. at, &c. well knowing the said last-mentioned false, forged, and counterfeited acceptance to be false, forged, and counterfeited, against the form, &c. and against the peace, &c.

(*Fifth count, for forging an indorsement, &c. as in the third count to the * *.*) an indorsement (v) of the said last-

(t) See the stat. 45 G. 3. c. 89. vide supra, p. 515.

(u) It is usual, in a count of this kind, first to aver the date, direction, and other circumstances of the bill, and then to set it out; but the first averments seem to be superfluous, and the above form is

much more concise. It does not appear to be absolutely essential to set out the whole of the bill, since the *acceptance only* is alleged to have been forged. See p. 103, 4.

(v) See p. 107, 8. *R. v. Biggs*, 3 P. Wms. 419. See the stat. p. 514, 515.

mentioned bill of exchange, whose tenor follows, &c. that is to say, *S. R. and Son*, with intent to defraud, &c. (*as before.*)

(*Sixth count for publishing a forged indorsement, &c.; the form is the same with that of the fourth count, substituting the indorsement and its tenor for the acceptance and its tenor,*) against the form, &c. and against the peace, &c.

142. *Indictment for forging and publishing a receipt for payment of money (w).*

(*As in pr. 136 to the*.*) A certain acquittance and receipt (*x*) for money, to wit, for the sum of three pounds and three shillings, in the words, letters, and figures following, that is to say, "August the 26th, 1781. Received of Mr. J. B. for Moustone quarry, the full sum of three pounds three shillings. Received by me, T. F." with intent to defraud T. B. &c. &c. against the form, &c. and against the peace, &c. (*Second count for uttering.*) A certain false, forged, and counterfeited acquittance and receipt for money, to wit, for the sum of three pounds and three shillings, feloniously did utter and publish as true; which said last-mentioned false, forged, and counterfeited acquittance and receipt is in the words, letters, and figures following, that is to say, (*set out the receipt as before,*) with intent to defraud the said T. B. he the said A. B. at the time when he so uttered and published the said last-mentioned false, forged, and counterfeit acquittance and receipt, well knowing the same acquittance and receipt, so by him uttered and published, to be false, forged, and counterfeited; against the form, &c. and against the peace, &c.

143. *Indictment for feloniously altering a bank note (y).*

(*Comm. as in pr. 1.*) Having in his possession a bank

(*w*) See the st. 2 G. 2. c. 25. 45 G. 3. c. 89. Vide supra, p. 514, 515.

(*x*) Unless the instrument on the face of it appear to be a

receipt, it must be shewn, by the aid of proper averments, that it could so operate. See p. 107, 8.

(*y*) See p. 98.

note, whose tenor follows, that is to say, (*set out the note,*) feloniously did alter (z) the said bank note, by then and there falsely obliterating and defacing the letters *een* before printed in the word *fifteen* in the said bank note, and also the letters *een* before printed in the word *fifteen*, in white letters, on a black ground underneath the said bank note; and by then and there falsely making, forging, and counterfeiting, upon the said bank note, in the place of the first-mentioned letters *een*, before printed in the word *fifteen* in the said bank note, the letter *y*; and also by then and there falsely making, forging, and counterfeiting, upon the said bank note, in the place of the said letters *een*, before printed in the word *fifteen* in white letters on a black ground underneath the said bank note, another letter *y*; by reason and means of which said obliterating and defacing the said letters *een*, before printed in the said word *fifteen* in the said bank note, and also the letters *een*, being before printed in the said word *fifteen*, in white letters, on a black ground underneath the said bank note: and of falsely making, forging, and counterfeiting, upon the place of the said letters *een*, before printed in the word *fifteen* in the said bank note, the letter *y*; the letters *fift*, so remaining of the said word *fifteen* before printed in the said bank note, with the said first-mentioned letter *y*, so falsely made, forged, and counterfeited as aforesaid, did become, import, and signify *fifty*; and the letters *fift*, so remaining of the said *fifteen*, before printed in white letters, on a black ground underneath the said last-mentioned bank note, with the said other *y*, so falsely made, forged, and counterfeited as aforesaid, did become, import, and signify *fifty*; which said altered bank note is in the words, letters, and figures following, that is to say, (*set out the note as altered,*) with intent to defraud, &c. (*as in pr. 139 alleging in one count an intention to defraud the governor and company of the bank of England; in another, an intention to defraud the person to whom it is paid, &c.; add other counts alleging the forgery of the bank note as altered, and for uttering with intent to defraud, &c. see pr. 139.*)

(z) See the stat. 15 G. 2. c. 13. s. 11. 45 G. 3. c. 89. s. 2. *supra*, p. 511, 512.

144. *Indictment for forging a bond signed with a mark, and publishing the same with intent to defraud the executors of the person supposed to have made it (a).*

(Commencement as in *pr.* 141 to the*.) A certain bond, purporting (b) to be signed by one J. L. (then deceased) in his life time, with the *mark* of him the said J. L. and to be *sealed* (c) and delivered by the said J. L. in his life-time, the *tenor* of which said bond is as follows, (*set out the bond,*) “the mark of J. L. Sealed and delivered in the presence of, the mark of A. B., C. D.” with intent to defraud W. B. and T. W. executors of the last will and testament of the said J. L. of the sum of two hundred and fifty pounds, against the form of the statute, &c. and against the peace, &c. (2nd count.) That the aforesaid A. B. and C. D. afterwards, to wit, on, &c. at, &c. a certain false, forged, and counterfeit bond, purporting to have been signed by the said J. L. (then deceased) in his life-time with his mark and to have been sealed and delivered by the said J. L. in his life-time, with force and arms, feloniously did utter and publish as a true bond; which said bond so as aforesaid falsely made and counterfeited, is in the words and figures following, (*set out the bond,*) with intent to defraud the said W. B. and T. W. executors of the last will and testament of the said J. L. of the sum of two hundred and fifty pounds, (the said A. B. and C. D. at the time of publishing the said last-mentioned false, forged, and counterfeit bond, by them as aforesaid, then and there well knowing, and each of them well knowing, the same to have been false, forged, and counterfeited,) against the form of the statute, &c. and against the peace, &c.

(a) Under the stat. 2 G. 2. c. 25. and 45 G. 3. c. 89. See note, p. 515.

(b) As to the use and effect

of the term *purport*, see p. 104, 105, 6, 7.

(c) This allegation is necessary, see p. 109.

145. *Indictment (d) for forging a receipt of the Sun Fire Office Society (e).*

That on, &c. there was, and ever since hath been, and now is, a certain society, corporation, and company of persons, during all the time aforesaid, known by the name of the Society of the Sun Fire Office in London; and that the said society, during all the time aforesaid, were, and are, a certain company and corporation of persons associated together in copartnership, for the purpose of insuring houses and other buildings, goods, wares, and merchandizes, from loss and damage by fire, upon certain terms and conditions agreed upon between the said society and the persons making such insurances, and in consideration of certain sums of money paid by persons making and continuing such insurance to the said society as premiums or rewards for such insurances, to wit, at R. in the said county of B. and that on, &c. one R. B. of R. aforesaid, grocer, had caused the household goods and furniture of him the said R. B. in his then and now dwelling house, situate in R. aforesaid, to be insured by the said society from loss or damage by fire, not exceeding the sum of one hundred pounds; the utensils and stock of the said R. B. therein, and in the warehouse under the same roof, to be insured by the said society from loss or damage by fire, not exceeding the sum of seventeen hundred and seventy pounds; and three tenements of the said R. B. adjoining, in R. aforesaid, then in the tenure of H. C. and others, labourers, to be insured by the said society from loss or damage by fire, not exceeding the sum of one hundred and thirty pounds, upon certain terms and conditions then agreed upon between the said R. B. and the said society, to wit, at R. aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that R. S. late of R. aforesaid, gentleman, on, &c. and for six months or more before that time, and continually from thence until the day of the taking of this inquisition, was an agent of the said society,

(d) From the C. C. A. tions by the stat. 31 G. 2. c. 1787. 22. s. 78. re-enacted by stat. 45.

(e) Upon the stat. 2 G. 2. G. 3. c. 89. See note, p. 515. c. 25. as extended to corpora-

intrusted by the said society to receive, for the use of the said society, monies paid to the said R. S. as an agent of the said society, for the use of the said society, as and for premiums and rewards for such insurances, made and continued by the said society, to wit, at R. aforesaid, in the said county of B.; and the jurors aforesaid, upon their oath aforesaid, do further present, that W. H. late of R. aforesaid, gentleman, on, &c. well knowing the premises, with force and arms, at, &c. in the said county of B. feloniously did falsely make, forge, and counterfeit, and feloniously did cause and procure to be falsely made, forged, and counterfeited, and feloniously did willingly act and assist in the false making, forging, and counterfeiting, a certain receipt for money (*f*), purporting to be a receipt given to the said R. B. for the sum of three pounds and eighteen shillings, received from the said R. B. for the use of the said society, by the said R. S. as the agent of the said society, as and for a premium and reward paid by the said R. B. to the said R. S. as agent of the said society, for the use of the said society, for the continuance of the said assurance made by the said R. B. as aforesaid, for one year, from &c. until, &c. which said false, forged, and counterfeited receipt for money, so falsely made, forged, and counterfeited as aforesaid, is in the words, letters, figures, and cyphers following, to wit,—
 “ Pol. No. 374,382, at 3*l*. 18*s*. per annum; Rect. No. 47,230. Received of Mr. R. B. the sum of three pounds eighteen shillings, for one year’s insurance in the Sun-fire-office, London, from Michaelmas last to Michaelmas next, by us, members of the said office, the second day of October, 1781. Henry Plant. Frederick Pigou. Witness R. S.” and which said false, forged, and counterfeited receipt for money, in the said words, letters, figures, and cyphers, at the time of falsely making, forging, and counterfeiting the same, did, and still doth, import and signify, that the said R. S. had, on, &c. received, as the agent of the said society, for the use of the said society, the sum of three pounds and eighteen shillings

(*f*) It seems to be unnecessary to set out the purport here, see p. 104, 5, 6, 7. It would be better, after the word

money, to say “to the tenor following,” and then to set out the receipt.

from the said R. B. as a premium and reward for the continuance of the said insurance, so made by the said R. B. as aforesaid, for one year, from, &c. until, &c. with intent to defraud the said R. S. against the form of the statute in such case made and provided, and against the peace, &c. (2d count.) That the said R. S. being an agent of the said society as aforesaid, and the said R. B. having made such insurance as aforesaid, the said W. H. on, &c. well knowing the premises aforesaid, with force and arms, at R. aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and feloniously did cause and procure to be falsely made, forged, and counterfeited, and feloniously did willingly act and assist in the false making, forging, and counterfeiting, a certain receipt for money (g), whose tenor follows, that is to say, (*set out the receipt and explain the import, and conclude as before,*) with intent to defraud the said R. B. against the form of the statute, &c. and against the peace, &c. (3d count.) That the said R. S. being an agent of the said society as aforesaid, and the said R. B. having made such insurance as aforesaid, the said W. H. on, &c. well knowing the premises aforesaid, with force and arms, at R. aforesaid, in the county aforesaid, feloniously did utter and publish, as true, a certain false, forged, and counterfeited receipt for money, whose tenor follows, that is to say, (*set out the receipt, its import, allege the publication, and conclude as in preceding count.*)

146. *Indictment for altering an accountable receipt, given by one of the clerks of the banks of England (h).*

That J. H. late of, &c. gentleman, on, &c. having in his custody and possession a certain accountable receipt

(g) In the original the purport is set out as in the first count.

(h) *R. v. Harrison, Leach*, 215. The first four counts of this indictment are given in the C. C. A. 280. I have omitted the two first counts (upon which the prisoner was acquitted,) and which appear

to be vicious for averring, that the receipt, upon which the indictment is founded, purports to be a receipt given by one J. C. on behalf of the governor and company of the bank of England, since in fact it does not so purport, see p. 104, 5. The same objection applied to the third count,

for bank notes for payment of money, given on, &c. by J. C. who then was and still is a clerk of the governor and company of the bank of England, for and on behalf of the said governor and company, to a certain corporation called 'The London Assurance, for divers bank notes then received by him the said J. C. from the said corporation called The London Assurance, for the said governor and company, (the said last-mentioned bank notes being notes for payment of money, to wit, for the payment of the sum of two hundred and ten pounds,) which said accountable receipt for bank notes for payment of money was then in the words, letters, figures, and cypher following, that is to say, "1777. June 16, bank notes, C. £210;" which said last-mentioned figures and cypher 210, did import, signify, and express two hundred and ten pounds; he the said J. H. on, &c. with force and arms, at &c. feloniously did falsely *alter* (i), and feloniously did cause and procure to be falsely altered, and feloniously did willingly act and assist in the false altering, the principal sum of the said accountable receipt for the last-mentioned bank notes for payment of money, to wit, the said sum of two hundred and ten pounds, by feloniously and falsely making, forging, counterfeiting, and prefixing, and feloniously causing and procuring to be falsely made, forged, counterfeited, and prefixed, and feloniously and willingly acting and assisting in the false making, forging, counterfeiting, and prefixing, the figure 3 to the said figures and cypher 210, whereby the words, letters, figures, and cypher, "1777. June 16, bank notes, C. £210," together with the figure 3, so falsely made, forged, counterfeited, and prefixed

which I have ventured to alter.

The prisoner was convicted on the two counts inserted above, and also on similar counts, charging an intention to defraud the governor and company of the bank of England and the London Assurance of houses and goods from fire. But it was doubted whether the st. 7 G. 2. c. 22. on which the counts were framed, upon which

the prisoner had been found guilty, extended to corporations, and the prisoner was not executed.

The stat. 18 G. 3. c. 18. afterwards removed all doubt upon the subject. The offence is also prohibited by the stat. 45 G. 3. c. 89. See note, p. 515.

(i) See the observations, p. 98, 9.

as aforesaid, then did, and still do, import, signify, and express, that the said J. C. as clerk of the said governor and company of the bank of England, had, on, &c. received of the said corporation, called The London Assurance, bank notes for payment of money to the amount of the sum of three thousand two hundred and ten pounds, with intention to defraud the said corporation called The London Assurance, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity (*k*).

(*2nd count.*) That the said J. H. on, &c. with force and arms, at, &c. *feloniously did utter and publish as true*, a certain false, altered, forged, and counterfeited accountable receipt for bank notes for payment of money, which said last-mentioned false, altered, and forged accountable receipt for bank notes for payment of money was, and is, in the words, letters, figures, and cypher following, to wit, "1777, June 16, bank notes, C. £3210;" and which said last-mentioned false, altered, and forged accountable receipt, in the said words, letters, figures, and cypher, last-mentioned, then did, and still doth, import, (*aver the import as before*) with intention to defraud the said corporation called The London Assurance (he the said J. H. at the time he so as aforesaid uttered and published, as true, the said last-mentioned false, altered, forged, and counterfeited accountable receipt for bank notes for payment of money, well knowing the same to be false, altered, forged, and counterfeited,) against the form of the statute, &c. and against the peace, &c.

147. Indictment for forging a will (*l*).

That S. L. widow, heir at law of Sir A. C. knight, de-

(*k*) The defendant is in this count specially charged with the *alteration* of the receipt, but he may, in such case, be charged generally with the forgery of the whole. See Dawson's case, p. 99.

(*l*) Under the st. 2 G. 2.

c. 25. and 45 G. 3. c. 89. vide supra, note, p. 515. This was the indictment used in the case of Birch and Martin, who were tried and executed for having forged Sir A. Chadwick's will. See Leach, 92, and p. 104.

ceased, on, &c. and long before, was, and still is (m) seized in her demesne as of fee of and in certain messuages and tenements, with the appurtenances, situate and being in, &c. as heir at law of the said A. C. who died seized thereof in his demesne as of fee; and that E. B. late of, &c. gentleman, and M. M. late of, &c. on, &c. with force and arms, at, &c. (*as in pr. 141 to the**,) a certain paper writing, with a seal thereto affixed, *purporting* (n) to be the last will and testament of the said Sir A. C. deceased, and to be signed by the said Sir A. C. in his life-time with the name of A. C. and to be sealed and delivered by the said Sir A. C. in his life-time as and for his last will and testament (o) the tenor of which said false, forged, and counterfeited will in writing is as follows, that is to say, "in the name of God, amen: I, A. C. &c." (*set out the will,*) with intent to defraud the said S. L. of the said messuages and tenements, with the appurtenances, against the form, &c. and against the peace, &c. (*2nd count, inducement as in the first*) and that the said E. B. and M. M. afterwards, to wit, on the said, &c. at, &c. aforesaid, a certain false, forged, and counterfeited paper writing, with a seal thereto affixed, purporting to be the last will and testament of the said Sir A. C. deceased, and to be signed by the said Sir A. C. in his life-time with the name of A. C. and to be sealed and delivered by the said Sir A. C. in his life-time as and for his last will and testament, with force and arms, feloniously did utter and publish as a true will in writing; the tenor of which said false, forged, and counterfeited will in writing is as follows, that is to say, (*set out the will,*) with intention to defraud the said S. L. of the said last-mentioned messuages and tenements, with the appurtenances, (they the said E. B. and M. M. at the time of the uttering and publishing

(m) This inducement does not appear to be necessary under the above stat. since the crime of forgery is complete by the false making of the instrument, although from circumstances the intention cannot be carried into effect. See p. 110. and p. 180.

(n) As to this allegation, see p. 100.

(o) It was objected to this indictment, that it did not allege that the will purported to be attested by three witnesses, but since that fact appeared from the tenor set out, it was holden to be sufficient. *East. P. C.* 980. *Leach*, 92.

of the said false, forged, and counterfeited will in writing by them as aforesaid, then and there well knowing (*p*) the same will to be false, forged, and counterfeited,) against the form, &c. and against the peace, &c. (*3rd count, stating that the said Sir A. C. died seized, &c. without making a will, &c.*) And the jurors, &c. that the said Sir A. C. knight, deceased, was in his life-time, to wit, on, &c. and long before, seized in his demesne as of fee of and in certain messuages and tenements, with the appurtenances, situate and being in, &c. and on, &c. at, &c. aforesaid, died so seized of and in the said messuages and tenements, with the appurtenances, without disposing thereof by his last will and testament to any person or persons whatsoever*, whereby the said messuages and tenements with the appurtenances, at the parish last aforesaid, upon the death of the said Sir A. C. descended and came to the said S. L. as the heir at law of the said Sir A. C. and that the said E. B. and M. M. afterwards, to wit, on, &c. (*and proceed as in the first count.*) (*4th count for uttering, with intent to defraud the person who would by law be entitled, &c. as in the last count, to the*, then allege the uttering, &c. as in the 2nd count.*) With intention to defraud the person or persons who would by law be entitled to the aforesaid messuages and tenements, with the appurtenances, whereof the said Sir A. C. died so seized as aforesaid, (*allege the guilty knowledge, and conclude as in the second count.*)

148. *Indictment for feloniously personating another person, and becoming bail in his name before a commissioner of the court of Common Pleas appointed to take bail in the country (q).*

That on, &c. our said lord the king, by his writ of *capias* issued out of the court of our said lord the king, of Common Pleas at Westminster, bearing date the same

(*p*) It was objected that the indictment should have alleged “and each of them knowing,” but the objection was over-ruled. East. P. C. 980.

(*q*) By stat. 4 Will. & M. ch. 4. s. 4. (entitled, “An Act for taking special Bails in the Country, upon Actions and Suits depending in the Courts of King’s Bench, Common

day and year, directed to the sheriff of ———, did command the said sheriff, that he should take C. D. late of ———, yeoman, and J. D. if they should be found in his bailiwick, and them safely keep so that he might have their bodies before the justices of our said lord the king, at Westminster, in three weeks from the day of St. Michael, to answer to E. F. of a plea that (*according to the exigency of the writ,*) which said writ afterwards, and before the delivery thereof to the said sheriff of the said county of ——— to be executed on, &c., at &c. was duly marked and indorsed for bail for the sum of ———*l.* according to the form of the statute (*r*) in such case made and provided, and which said writ, so indorsed, afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to G. H. esq. then sheriff of the county aforesaid, in due form of law to be executed, which said G. H. sheriff of the county aforesaid, by virtue of the writ aforesaid, afterwards, and before the return thereof, to wit, on the said ——— day of ——— in

Pleas, and Exchequer, at Westminster,"') it is enacted, that if any person or persons shall (before any person or persons empowered by virtue of that act to take bail or bails) represent or personate any other person or persons, whereby the person or persons so represented and personated, may be liable to the payment of any sum or sums of money, for debt or damages to be recovered in the same suit or action, wherein such person or persons are represented and personated, as if he or they had really acknowledged and entered into the same, being lawfully convicted thereof, shall be adjudged, esteemed, and be taken to be felons, and suffer as such.

By stat. 21 Jac. 1. c. 26. all persons who shall acknowledge

or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds, inrolled, statutes, recognizances, bail, or judgment, in the name of any person or persons not privy or consenting to the same, and being thereof lawfully convicted or attainted, shall incur the penalties of such felons without benefit of clergy.

A bail before a judge was not bail within this statute, till it was filed of record, and if it was not filed, the acknowledging thereof in another's name was not felony but a misdemeanor only; but now it is felony by stat. 4 Will. & M. c. 4. Vide 27 Geo. 3. c. 43. respecting special bail at Chester. St. 4 Geo. 3. c. 46. s. 5. as to co. palatine of Lancaster.

(*r*) 12 G. 1. c. 29. s. 9.

the year aforesaid, and within his bailiwick as such sheriff, to wit, at, &c. did take and arrest the said C. D. in the said writ and warrant above named, according to the command of the writ and warrant aforesaid, and him the said C. D. then and there had in his custody, by virtue of the said writ; and that A. B. late of, &c. yeoman, contriving and intending to prejudice and bring one S. T. to great expenses, and unlawfully to subject him the said S. T. to the payment of a great sum of money, afterwards, to wit, on, &c. at, &c. in his own proper person came before C. T. gentleman, and then and there, with force and arms, feloniously did represent and personate the person of the said S. T. of, &c. yeoman, and in the name and by the addition of him the said S. T. did become bail for the said C. D. in a certain recognizance taken before the said C. T. in the action aforesaid (he the said C. T. then and there having full and lawful power and authority, by virtue of a commission under the seal of the said court of Common Pleas, to take a recognizance in that behalf in the said county of———, according to the form of the statute in such case made and provided,) by which said recognizance he the said A. B. (by feloniously representing and personating the person of the said S. T.) in the name and by the addition of him the said S. T. as aforesaid, before the said C. T. then and there unlawfully and feloniously did acknowledge to owe to the said E. F. the sum of———l. to be levied upon the goods and chattels, lands and tenements, of him the said S. T. upon condition that if the said C. D. should be condemned in the said action, he the said C. D. should pay the condemnation money, or render himself into the Fleet for the same; or if he failed so to do, he the said S. T. (meaning the said S. T. of———, in the county aforesaid, yeoman, so represented and personated by the said A. B. as aforesaid) did undertake to do it for him (meaning the said C. D.) whereby he the said S. T. so represented and personated as aforesaid, *might* have been liable to the payment of the said sum of———l. to be recovered in the same action, as if he had really himself acknowledged and entered into the said recognizance, against the form, &c. and against the peace, &c.

149. *Indictment at common law for forging a writ of fieri facias, and thereby taking a person's goods in execution.*

That L. Y. late of, &c. gentleman, falsely, unlawfully and wickedly devising, contriving, and intending one A. K. late of the same parish and county, yeoman, unjustly, maliciously, and injuriously to aggrieve, oppress, and impoverish, on, &c. with force and arms, at, &c. unlawfully, knowingly, subtilly, and falsely did forge and counterfeit a certain writing, engrossed on parchment, in form and to the likeness and similitude of a writ of our lord the king of *fieri facias*, whose tenor follows, that is to say, (*set out the forged writ accurately.*) And the jurors, &c. that the said L. Y. afterwards, to wit, on, &c. at, &c. the said false, forged, and counterfeit writing, falsely forged, purporting to be a writ of *fieri facias*, subtilly, falsely, knowingly, and deceitfully did pronounce and publish; and then and there, to wit, on the same, &c. at, &c.* subtilly, falsely, knowingly, and deceitfully, as a true writ of our said lord the king of *fieri facias*, did cause to be delivered to the then sheriff of ———, for execution to be made thereof; and afterwards, to wit, on, &c. at, &c. did cause to be seized and taken divers goods and chattels of the said A. K. by pretence of that writ, to the great damage and oppression of the said A. K. and against the peace, &c. (*Second count for publishing.*) A certain false, forged, and counterfeit writing, engrossed on parchment, falsely forged, in form and to the likeness and similitude of a writ of our said lord the king of *fieri facias* issuing out of the said court of our said lord the king of Common Pleas, unlawfully and deceitfully did pronounce and publish as a true writ of our said lord the king, whose tenor follows, that is to say, (*set out the writ*) although he the said L. Y. then and there well knew the same to be false, forged, and counterfeited, and the same then and there, to wit, on, &c. at, &c. (*as in the first count from the*.*)

PERJURY.

150. *Indictment for PERJURY (s) at Chester assizes, in giving evidence on the trial of a felon.*

Cheshire. The jurors for our lord the king upon their

(s) But by stat. 5 Eliz. c. 9. s. 3. if any person or persons shall unlawfully and corruptly procure any witness or witnesses, by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever depending in suit and variance by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts therein mentioned, (being of almost every description, except the ecclesiastical courts;) or shall unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam*, then every such offender or offenders shall, for his, her, or their said offence, being thereof lawfully convicted or

attainted, lose and forfeit the sum of forty pounds,

By s. 4. Persons so convicted or attainted, not having goods or other property to the value of the penalty, shall suffer imprisonment for the space of half a year, and stand upon the pillory, for one hour, in some market town next adjoining to the place where the offence was committed.

s. 5. Those convicted shall not be received as witnesses in any court of record, until such time as the judgment given against them be reversed, by attaint or otherwise, and upon every such reversal the parties grieved shall recover their damages, &c. (*as in the next section.*)

s. 6. One convicted* or attainted of perjury by his deposition, &c. shall forfeit twenty pounds, and be imprisoned for the space of six months; and the oath of such person shall not be received in any court of

* This is good cause of challenge, if he be a juror. 2 Haw. c. 43. s. 25.

oath present, that at the court of session and gaol-delivery of our sovereign lord the king, holden for the county

record until the judgment be reversed, by attainr or otherwise; and upon every such reversal the party grieved shall recover his damages against the person who procured the said judgment so reversed to be given against him, by an action on the case.

s. 7. If the offender has not goods sufficient to satisfy the twenty pounds, he shall be set on the pillory, in some market-place, near, &c. and there to have both his ears nailed, and from thenceforth be disabled from being sworn in any court of record, until such time as the judgment shall be reversed, upon which he shall recover his damages as before mentioned.

s. 9. As well the judge and judges of every of the courts where any such suit is or shall be, and whereupon any such perjury is or shall be committed*, as also the justices of assize and gaol-delivery in their several circuits, and the justices of the peace† in every county within this realm, or in Wales, at their quarter-sessions, both within liberties and without, shall have full power and authority to inquire of all offences and defaults committed contrary to this act, by inqui-

sition, presentment, bill, or information, or otherwise lawfully to hear and determine the same, and to give judgment, award process, and execution of the same, according to the course of the laws of this realm.

The stat. 2 Geo. 2. c. 25. s. 2. (made perpetual by the st. 8 G. 2. c. 18.) enacts, that, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction, within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper, and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such

* A defendant under this charge may, upon his own confession that an affidavit made by him was false, be put in the pillory by the authority of the court in which the affidavit was made. *Therowgood's case*, 8 Mod. 179.

† Justices of the peace have no jurisdiction over perjury at common law. *R. v. Yarrington*, Sa.k. 406. 2 Haw. c. 8. s. 38.

of Chester, at the castle of Chester, in the same county, on, &c. before the honourable J. M. his majesty's chief

person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported, shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

By stat. 23 Geo. 2. c. 11. s. 1. it is enacted, that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, (averring such court or person or persons to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other

than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding.

By s. 2. in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed; any law, &c. (*as before.*)

By sec. 3. the justices of assize, nisi prius, or general gaol-delivery, or any of the great sessions in Wales, or of the counties palatine (during the sitting of the court, or within twenty-four hours after), may direct prosecutions against persons, examined before them, committing of perjury, and assign the prosecutor counsel; and such prosecution shall be carried on without any tax, duty, or fees in court, or to any officer of the court; and the

justice of and for the said county, and J. S. esq. his said majesty's other justice there, one G. B. was in due form of law tried upon a certain indictment then and there depending against him for having, on the 20th day of July, in the 25th year (b), &c. feloniously stolen, taken, and carried away nineteen guineas of the monies of one J. Earle; and that at the said trial, so then and there had as aforesaid, J. S. late of ———, labourer, appeared as a witness for and on behalf of the said G. B. upon the said trial, and was sworn and took his corporal oath (c) before the said J. M. and J. S. (d), justices as aforesaid, on the holy gospel (e) of God, to speak the truth, the whole truth, and nothing but the truth, of, upon, and concerning the matter then depending, (they the said J. M. and J. S. justices as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said J. S. in that behalf,*) and the said J. S. being so sworn as aforesaid, wickedly contriving and intending to

clerk of assize, or his associate or prothonotary, or other proper officer of the court, shall, without fee or reward, give the party injured, or other person undertaking such prosecution, a certificate of the same, being directed, together with the names of the counsel assigned by the court, &c.

As to perjuries committed by attornies, solicitors, or agents, in courts of law or equity, see 12 Geo. 1. c. 29. s. 4.; as to bankrupts, &c. 1 Jac. 1. c. 15. s. 9. 11. 5 Geo. 2. c. 30. s. 29; witnesses in courts martial respecting naval offences, 22 Geo. 2. c. 33. s. 17.; electors in London, 11 Geo. 1. c. 18. s. 3.; same, and returning officers, in counties, cities, boroughs, &c. 2 Geo. 2. c. 24. s. 5 & 6; insolvent debtors, 52 Geo. 3. c. 102. s. 28.

Quakers making solemn af-

firmation wilfully and corruptly, shall suffer as in cases of perjury. 8 Geo. 1. c. 6. s. 2. Vide also 22 Geo. 2. c. 46. s. 36.

(b) The original C. C. A. sets out the indictment at large, but this is unnecessary and improper, see p. 114.

(c) As to this averment, see p. 117.

(d) In Alford's case, Leach, 179. the names of both the justices then in the commission, were mentioned in the caption, and the oath was alleged to have been taken before one only. It was also objected that there was a variance between the indictment and the nisi prius record of the cause, which stated, in the usual form, that the trial was before both the judges. But the judges held that the conviction was good.

(e) See p. 117.

cause the said G. B. unjustly to be acquitted of the said felony, did then and there knowingly, falsely, corruptly; wilfully, and wickedly say, depose, and give in evidence, to the jurors of the jury then and there duly taken and sworn between our said lord the king and the said G. B. before the said J. M. and J. S. justices as aforesaid, that he the said J. S. on the second day of Knutsford races (meaning the twenty-sixth (*f*) day of July, in the year of our Lord one thousand seven hundred and seventy-five, being the second of three successive days on which certain horse-races were run at Knutsford, in the said county of Chester, in that year,) was in a certain booth at Knutsford aforesaid, known by the sign of the Bull's Head, kept by one R. Graves; and that he the said J. Earle came into the said booth, and sat down by him, (meaning himself the said J. S.) on the left-hand side; and that he (meaning himself the said J. S.) asked the said J. Earle if he (meaning the said J. Earle) was not ill; and that he (meaning the said J. Earle) said, I (meaning himself the said J. Earle) am well enough, I (meaning himself the said J. Earle) have been playing at cards with a parcel of men, and have lost a great deal of money; and that he the said J. S. said, man (meaning the said J. Earle) I (meaning himself the said J. S.) am very sorry for you (meaning the said J. Earle): and that the said J. S. upon his oath aforesaid, before the said jury so taken

(*f*) This innuendo is objectionable, since it alters the sense of the defendant's words. See p. 119. Gripe's case, *Ld. Ray.* 256. The objection would be obviated by alleging, after the*, "and the jurors aforesaid, &c. do say, that the second of three successive days, upon which certain horse races had before then been run, at Knutsford, &c. was the 26th day of July, in the year of our Lord, &c. and that it then and there, to wit, on, &c. at, &c. upon the said trial, became and was a material question, whether the said J. Sadler, on

the said second day of Knutsford races, was in a certain booth, &c. (*and after setting out the material questions,*) And the jurors now here sworn upon their oath aforesaid, do further present, that, the said J. S. being so sworn as aforesaid, &c." (*and then by proceeding as above.*) And an express allegation is necessary, in order to shew the *materiality* of the matter sworn to, which otherwise would not appear, see p. 116. As to the nature and use of innuendos, see p. 118.

between our said lord the king and the said G. B. and the said J. M. and J. S. justices as aforesaid, did further say, depose, swear, and give in evidence, that the said J. Earle then and there took him the said J. S. by the hand, and said, I (meaning himself the said J. Earle) will never play at cards any more: whereas, in truth and in fact, the said J. Earle did not sit down by the said J. S. in the said booth, on the said twenty-sixth day of July; and whereas, in truth and in fact, the said J. S. did not ask the said J. Earle whether he was well or not; and whereas, in truth and in fact, the said J. Earle did not say to the said J. S. that he was well enough; and whereas, in truth and in fact, the said J. Earle did not say to the said J. S. that he the said J. Earle had been playing at cards with a parcel of men, and had lost a great deal of money; and whereas, in truth and in fact, the said J. S. did not say to the said J. E. that he (meaning himself the said J. S.) was sorry for him (meaning the said J. E.); and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he would never play at cards any more; and whereas, in truth and in fact, the said J. E. had not, on the said ——— day of ———, any conversation whatsoever with the said J. S.: and so the jurors aforesaid now here sworn, upon their oath aforesaid, do say, that the said J. S. at the said court of session and gaol-delivery of our sovereign lord the king, holden at the castle of Chester aforesaid, in and for the said county of Chester, before the said J. M. and J. S. then being such justices as aforesaid (and then and there having sufficient and competent power and authority to administer the said oath to the said J. S.) did, in manner and form aforesaid, commit wilful and corrupt perjury, against the peace, &c.

151. *Indictment for perjury committed on the execution of a writ of inquiry.*

That on, &c. at &c. a certain writ of inquiry in a certain cause in which F. G. was plaintiff, and H. I. the defendant, came on to be executed, and was then and there executed before M. N. esq. then being sheriff of the said county, and that A. B. late of, &c. labourer, did then and there before the said L. M. take his oath upon the Holy Gospel of God, to speak the truth, the whole truth, and

nothing but the truth, touching and concerning the matters there in question between the said parties, he the said L. M. as such sheriff as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said A. B. and that the said A. B. being so sworn as aforesaid, unlawfully, wickedly, and maliciously contriving, devising, designing, and intending to induce the jurors of a certain jury summoned, and then and there duly sworn, to inquire of the truth of the premises aforesaid, to find and give small and inconsiderable damages for the said F. G. the plaintiff aforesaid, on that inquest, and unjustly designing and intending to aggrieve, injure, and prejudice the said F. G. then and there, to wit, on, &c. at, &c. before the said M. N. being such sheriff as aforesaid, upon his said oath so taken as aforesaid, upon the occasion aforesaid, falsely, wickedly, maliciously, wilfully, and corruptly, did say, depose, affirm, and give in evidence before the said L. M. being such sheriff as aforesaid, and to and before the jurors of the said jury summoned to inquire as aforesaid, that (*set out the perjury and averments to falsify :*) and so the jurors aforesaid now here sworn, upon their oath aforesaid, do say, that the said A. B. on, &c. at, &c. before the said L. M. being such sheriff as aforesaid, then and there having such authority as aforesaid, of his own most wicked, malicious, and corrupt mind and disposition, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great damage of the said F. G. and against the peace, &c.

152. *Indictment for perjury committed at the quarter sessions, upon the trial of an indictment for an assault.*

That on, &c. at, &c. at the court of general quarter sessions of the peace, then and there holden in and for the said county of L. one C. D. was in due form of law tried upon an indictment then depending against him the said C. D. for an assault upon one E. F. and that it then and there became and was a material question upon the trial of the said indictment, whether, &c. and that A. B. late of, &c. labourer, did then and there take his corporal oath before the said court, upon the holy gospel of God, speak the truth, the whole truth, and nothing but the

truth, concerning the matter then depending, (the said court then and there having competent power and authority to administer the said oath to the said A. B.) and that the said A. B. being duly sworn as aforesaid, wickedly devising and intending to pervert the due course of law and justice, and to cause the said C. D. to be unjustly convicted of the trespass and assault so charged against him as aforesaid, in and by the said indictment, did then, to wit, on, &c. before the said court, to wit, at, &c. falsely, knowingly, wickedly, wilfully, and corruptly, by his own act and consent, say, depose, and give in evidence to the jurors of the jury then and there duly sworn and taken between our said lord the king and the said C. D. that on, &c. (*here set out so much of the evidence as can be proved to be false, and the averments to falsify :*) and so the jurors aforesaid now here sworn, upon their oath aforesaid, do say, that the said A. B. at and upon the said trial, to wit, on, &c. before the said court then and there having sufficient and competent power and authority as aforesaid, did, in manner and form aforesaid, commit wilful and corrupt perjury, against the peace, &c.

153. *Indictment for perjury by a woman before two justices, on the filiation of a child.*

That A. B. late of, &c. single woman, on, &c. at, &c. being pregnant (g), was delivered of a male child, which by the laws of this realm was born a bastard, and that the said A. B. afterwards, to wit, on, &c. at &c. came in her own proper person before J. H. esq. and G. H. esq. then being two of the justices of our said lord the king, assigned to keep the peace of our said lord the king within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and did then and there, before the said justices, charge one E. F. of the parish aforesaid, with having lately before that time begotten upon the

(g) If the filiation took place before the birth, allege "being pregnant with a child likely to be born a bastard."

body of her the said A. B. (*h*) a certain male child, which was afterwards born alive of the body of her the said A. B. a bastard; and that she the said A. B. was then and there before the said justices duly sworn, and did take her corporal oath upon the holy gospel of God concerning the said premises (they the said justices, and each of them, then and there having sufficient and competent power and authority to administer the said oath to the said A. B.); and that the said A. B. being so sworn as aforesaid, wickedly and maliciously devising and intending falsely and unjustly to charge and burthen the said E. F. with the maintenance and support of the said bastard child, and not only to draw him into great charges and expense of his monies, but also to bring him into great scandal, infamy, and disgrace, as a lewd and unchaste person, then and there, upon her oath aforesaid, in a certain examination before the said justices, taken in writing in that behalf, did falsely, maliciously, wilfully, wickedly, and corruptly say, depose, and swear (amongst other things) in substance and to the effect following, that is to say, (*set out as much of the examination as can be proved to be false, and the averments to falsify:*) and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. on, &c. at, &c. before the said J. H. and G. H. the justices as aforesaid (so as aforesaid having sufficient and competent power and authority to administer the said oath to the said A. B.) falsely, maliciously, wickedly, wilfully, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great damage of the said E. F. and against the peace, &c.

154. *Indictment for perjury in an answer before one of the barons of the Exchequer.*

That one O. G. late of, &c. mariner, on, &c. did exhibit his English bill of complaint in writing in the court of our said lord the now king of his Exchequer (the said court then and still being at Westminster, in the said county of M.) against one T. S. late of Grub-street, in the parish of St. Giles, Cripplegate, London, merchant,

(*h*) If before the birth, say *was the* pregnant as aforesaid.
 “the said child with which she *said.*”

and one J. H. late of the same place, linen-draper, directed to the right honourable W. P. chancellor and under-treasurer of his majesty's Court of Exchequer, at Westminster; the honourable Sir J. S. knight, lord chief baron of the same court; and to the rest of the barons there, for the purpose, and praying (amongst other things) that *(set out as much as the bill as will explain the meaning of that part of the defendant's answer which is to be set out, and on which perjury is assignable,)* as in and by the said bill of complaint of the said O. G. remaining filed as of record in the said court of Exchequer, at Westminster aforesaid, in the said county of M. (amongst other things) more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. S. afterwards, to wit, on, &c. at the parish of St. George, Bloomsbury, in the said county of M. came in his own proper person before Sir B. H. knight, then being one of the barons of his majesty's said Court of Exchequer, at Westminster, and then and there before the said Sir B. H. exhibited and produced the answer in writing of him the said T. S. and of the said J. H. to the aforesaid bill of complaint of the said O. G. intitled, "the joint and several answer of T. S. and J. H. gentlemen, the defendants to the bill of complaint of O. G. complainant;" and that the said T. S. being then and there sworn in due form of law upon the holy gospel of God, before the said Sir B. H. knight, then being one of the said barons of the said Court of Exchequer, at Westminster aforesaid, (and then and there having sufficient and competent power and authority to administer an oath to the said T. S. in that behalf,) he the said T. S. did, upon his corporal oath concerning the matters contained in the said answer before the said Sir B. H. knight, then and there being such baron as aforesaid, then and there swear, that so much of the said answer of him the said T. S. so as aforesaid produced and exhibited before the said Sir B. H. as concerned the act and deed of him the said T. S. he the said T. S. knew to be true; and that so much of the said answer of him the said T. S. as concerned the act and deed of any other person, he the said T. S. believed to be true; and that the said T. S. contriving and intending unjustly to aggrieve the said O. G. the complainant aforesaid, did then and there, upon his oath aforesaid, in his answer aforesaid, before the said Sir B. H.

knight, then and there being such baron as aforesaid (and having such sufficient and competent power and authority as aforesaid,) knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, by his own act and consent (amongst other things,) answer, swear, and affirm in writing as follows, that is to say, (*set out the part on which perjury is assignable, the proper averments to falsify, as to the conclusion see pr. 153.*)

155. *Against a witness for perjury on a trial in C. B. in an action of trespass and assault.*

That on, &c. a certain cause in which C. D. was the plaintiff and E. F. the defendant, in due manner and form came on to be tried before Sir G. H. knt. then and still being chief justice of our said lord the king of the Common Pleas, at Westminster, in the parish of St. Margaret, within the liberty of Westminster, in the county of Middlesex, in the great hall of pleas there, by a certain jury then and there duly impannelled, sworn, and charged to try the said cause; upon which said trial one A. B. late of, &c. labourer, was then and there produced as a witness on the part of the said defendant in the said cause, and then and there before the aforesaid chief justice, and the said jury, was sworn upon the Holy Evangelists to speak the truth, the whole truth, and nothing but the truth, of and in the matters then and there depending, the said Sir G. H. chief justice as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said A. B. in that behalf; and that the said A. B. then and there falsely, maliciously, voluntarily, and corruptly, said, deposed, and gave in evidence to the said jury that, (*set out the matter sworn, falsify, as to the conclusion see pr. 150.*)

156. *For perjury in giving evidence upon the trial of an information at nisi prius.*

That on, &c. at the sittings of nisi prius holden in the court of our said lord the now king of his exchequer, in the parish of St. Margaret, within the liberty of Westminster, in the county of Middlesex, before Sir C. D. knight, lord chief baron of our said lord the king, of his

Court of Exchequer, at Westminster aforesaid, a certain issue before then duly joined upon an information before then exhibited by E. F. esq. his said majesty's attorney-general, who prosecuted for our said lord the king in that behalf against G. H. came on to be tried and was tried in due form of law, by a jury of the said county duly sworn between our said lord the king and the said G. H.; and that upon the said trial of the said information, A. B. late of, &c. labourer, did then and there appear as a witness for and on behalf of our said sovereign lord the king. (*Allege the taking of the oath, the competency of the court, the matter sworn, its falsity, as to the conclusion see pr. 152.*)

157. *Indictment for perjury, in an affidavit for debt, before a commissioner in the country, authorized to take affidavits respecting matters in K. B.*

That A. B. late of, &c. yeoman, being an evil-disposed person, and wickedly contriving and intending to aggrieve, injure, and prejudice one C. D. and to cause the sum of twenty pounds to be indorsed upon a certain process issuing out of the court of our said lord the king, before the king himself, called a *latitat*, with intention to cause and procure the said C. D. to be arrested, to appear in the same court, at the suit of the said A. B. and also with an intent that the said C. D. should be compelled to find bail for the said sum of twenty pounds, according to the form of the statute in such case made and provided, he the said A. B. on, &c. at, &c. came in his proper person before E. F. gentleman, then being a commissioner duly authorized and empowered to take and receive affidavits in, touching, and concerning matters and proceedings of or in the court of our said lord the king, before the king himself, to wit, on, &c. at, &c. and that the said A. B. then and there, to wit, on, &c. at, &c. was duly sworn, and did take his corporal oath, upon the holy gospel of God, before the said E. F. (he the said E. F. then and there having sufficient and competent power and authority to administer the said oath to the said A. B. in that behalf;) and that the said A. B. being so sworn as aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly did then and there, before the said E. F. as such commissioner as

aforesaid, depose, swear (i), and make affidavit in writing (amongst other things) in substance and to the effect following, that is to say, that C. D. (meaning the said C. D. before mentioned), of M. in the county of K. was justly and truly indebted unto him the said A. B. in the sum of twenty pounds of lawful money, for money lent and advanced, as by the same affidavit (k), affiled in the said court of our said lord the king, before the king himself, the said court then and still being at W. aforesaid, (amongst other things) more fully appears; whereas, in truth and in fact, he the said C. D. in the said affidavit named, was not, at the time of making the said affidavit, or at any other time, indebted unto him the said A. B. in the aforesaid sum of twenty pounds, in the said affidavit mentioned, for money lent and advanced, or upon any account whatsoever; and whereas, in truth and in fact, the said C. D. was not, at the time of making the said affidavit, or at any other time, indebted unto him the said A. B. in any sum of money whatsoever: and so (*Conclude as in pr. 151.*)

158. *Indictment for perjury at the trial of an issue at bar, directed out of the Court of Chancery, touching the capability of a person to make his will.*

That heretofore, to wit, on Saturday next after three weeks from the day of Easter, in Easter term, in the ——— year of the reign, &c. in the court of our said lord the king, before the king himself, (the said court then and still being at Westminster, in the said county of Middlesex) a certain issue directed by the present lord high chancellor of Great Britain, in due manner joined, touching and concerning the validity of a certain will and codicil of one W. B. deceased, in which said issue B. L. esq. was the plaintiff, and E. Y. esq. the defendant, in due manner came to be tried, and was then and there tried, in due form of law, by a certain jury of the country, in that behalf duly sworn and taken between the said parties: and the jurors aforesaid now here sworn, upon their oath aforesaid, do further present, that upon the trial of the said issue it then and there became and was

(i) See p. 121, 2.

(k) See p. 121, 2. n. (g).

made a material question between the said parties, whether the said W. B. at the time of signing, sealing, and publishing the said will, was of such sound and disposing mind as to be capable of making a will or not: and the jurors aforesaid now here sworn, upon their oath aforesaid, do further present, that A. B. late of, &c. yeoman. (*state the taking of the oath, the matter sworn, assign the perjury, as to the conclusion see pr. 152.*)

159. *Indictment for perjury on the trial of an issue, in an action of assumpsit, at the sittings after term, in the King's Bench.*

That at the sittings of nisi prius, holden after the term of St. Hilary, on, &c. at Westminster, in the county of Middlesex, in the great hall of pleas there, called Westminster Hall, before William earl of Mansfield, then being chief justice of our said lord the king, assigned to hold the pleas in the court of our said lord the king, before the king himself, a certain cause* in which C. D. was the plaintiff and E. F. the defendant, came on to be tried in due form of law, and was then and there tried, by a certain jury of the country in that behalf duly sworn and taken, between the parties aforesaid. And the jurors aforesaid, now here sworn, upon their oath aforesaid, do further present, that upon the trial of the said issue so joined between the parties aforesaid, A. B. late of, &c. yeoman, appeared as a witness for and on behalf of the said C. D. the plaintiff in the cause above mentioned, and was sworn, and then and there took his corporal oath, upon the holy gospel of God, before the said Earl of Mansfield, chief justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters then in question in the said cause, (he the said Earl of Mansfield, chief justice as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said A. B. in that behalf.) And the jurors aforesaid now here sworn, upon their oath aforesaid, do further present, that, upon the trial of the said cause, certain questions then and there became and were material, that is to say, whether, &c. (*set out such as are sworn to, and upon the answer to which perjury is to be assigned;*) and that the said A. B.

being so sworn as aforesaid, falsely, wickedly, wilfully, corruptly, and maliciously contriving and intending, as much as in him lay, to prevent justice, and pervert the due course of law, and to procure a verdict to pass against the said E. F. on the trial of the said cause, and thereby to subject him the said E. F. to the payment of sundry heavy costs, charges, and expenses, then and there, to wit, on, &c. at, &c. falsely, wickedly, wilfully, maliciously, and corruptly, and by his own act and consent, did say, depose, swear, and give evidence, (amongst other things) to and before the said jurors, so sworn to try the said issue as aforesaid, and the said Earl of Mansfield, the chief justice as aforesaid, in substance and to the effect following, that is to say, (*set out the matter sworn to upon which perjury is assignable, assign the perjury, as to the conclusion see pr. 152.*)

160. Indictment for perjury, in giving evidence at the assizes, upon the trial of a cause.

That at the assizes holden for the county of _____, on, &c. at, &c. before A. B. esquire, being one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and Sir C. D. knight (*l*), "one of the justices of our said lord the king of his Court of Common Pleas at Westminster," justices of our said lord the king, assigned to take the assizes in the said county, a certain cause, (*proceed as in pr. 159 from the *.*)

161. Indictment for perjury by a justice of the peace, in an affidavit before a judge of the court of King's Bench, upon shewing cause why a rule should not be made absolute for leave to file a criminal information against him.

That on, &c. (*m*) in the court of our said lord the king, before the king himself, (the same court then and still being at Westminster, in the county of Middlesex,) a rule of the said court was made, whereby, upon reading

(*l*) If one of the barons of the Exchequer, say, "one of the barons of the Exchequer of our said lord the king." Hil. Ent. 257.
(*m*) As in the rule.

the several affidavits of J. B. of the borough of A. in the county of B. innkeeper, and J. P. of the same place, victualler, it was ordered; That Saturday next after the octave of St. Martin should be given to W. H. esquire, to shew cause why an information should not be exhibited against him for certain misdemeanors, upon notice of that rule to be given to him in the mean time; and that afterwards, to wit, on Monday next after the octave of St. Martin, in the year aforesaid, at W. aforesaid, the said rule of court was enlarged by another rule of the same court there made, whereby, amongst other things, it was by the said court ordered, That the second day of the then next term should be peremptorily further given to the said W. H. to shew cause why an information should not be exhibited against him for certain misdemeanors (upon the undertaking in the same last-mentioned rule expressed); in and by one of which said affidavits, whereon the said original rule was grounded, to wit, the affidavit of the said J. B. it was sworn and alleged, (amongst other things) in substance and to the effect following, to wit, (*set out so much of the affidavits as explains that part of the defendant's affidavit which is to be set out, and upon which perjury is assignable.*) And the jurors aforesaid, upon their oath aforesaid, do further present, That the said W. H. late of, &c. having due notice of the said original rule, and the said other rule of court above mentioned respectively, minding and wickedly imagining, devising, and intending, by falsehood and wicked means, to procure the same first rule to be discharged and set aside, and to prevent justice and pervert the due course of law, and also to vex, harrass, aggrieve, and oppress the said J. B. and J. P. afterwards, to wit, on, &c. at, &c. in the said county of Middlesex, in his proper person, before Sir J. Y. knight, then and yet being one of the justices of our said lord the king, assigned to hold pleas in the said court of our lord the king, before the king himself, was duly sworn, and did take his corporal oath, upon the holy gospel of God, touching and concerning the matter of the said original rule then depending against him the said W. H. (he the said Sir J. Y. then and there having sufficient and competent power and authority to administer an oath to the said W. H. in that behalf); and that the said W. H. then and there, to wit, on, &c. at, &c. upon his oath aforesaid, before the said

Sir J. Y. the justice aforesaid, did falsely, maliciously, wickedly, wilfully, and corruptly say, depose, swear, and make affidavit in writing, (amongst other things) in substance and to the effect following, that is to say, that, (*set out such part of his affidavit as can be (n) contradicted, assign the perjury, as to the conclusion see pr. 153.*)

162. Indictment for perjury in an answer sworn before a master in Chancery.

That M. F. late of, &c. did exhibit her English bill of complaint, in writing, in the Court of Chancery of our said lord the king, (the same court then and still being at Westminster, in the said county of Middlesex,) against one A. B. directed to the Right Honourable A. Lord B. baron of C. lord high chancellor of Great Britain; whereupon the said M. F. by her said bill of complaint, did pray, (amongst other things) that the said A. B. might (*so much of the bill should be set out as will explain the meaning of the defendant's answer, without introducing new matter by way of innuendos, see p. 118.*) * as in and by the said bill of complaint of her the said M. F. remaining filed as of record in the said Court of Chancery, at Westminster aforesaid, in the said county of Middlesex, (amongst other things) more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, 'That the said A. B. the defendant named in the said bill of complaint of the said M. F. afterwards, to wit, on, &c. at, &c. (o), came in his own proper person before A. A. esquire, then being one of the masters of the said Court of Chancery, and then and there before the said A. A. esquire, exhibited and produced the answer in writing of him the said A. B. to the aforesaid bill of complaint of her the said M. F. intituled, "The answer of A. B. brewer, the defendant to the bill of complaint of M. F. widow, complainant;" and that the said A. B. then and there in due form of law was sworn, and did take his corporal oath, upon the holy gospel of God, before the said A. A. esquire, then being one of the said mas-

(n) It is not necessary to aver, that any use was made of the affidavit, see p. 121, 2. (g).

(o) The place is not material. See p. 65, 6. Holt. R. 534.

ters of the said Court of Chancery, (and then and there having sufficient and competent power and authority to administer an oath to the said A. B. in that behalf;) and that the said A. B. being so sworn as aforesaid, did, upon his corporal oath, concerning the matters contained in the said answer, before the said A. A. then as aforesaid being one of the said masters of the said Court of Chancery, then and there swear, that so much of the said answer of him the said A. B. so as aforesaid produced and exhibited before the said A. A. as concerned the act and deed of him the said A. B. he the said A. B. knew to be true; and that so much of the said answer of him the said A. B. as concerned the act and deed of any other person, he the said A. B. *believed* (*p*) to be true; and that the said A. B. minding and intending unjustly to aggrieve the said M. F. the complainant aforesaid, did then and there, upon his oath aforesaid, in his answer aforesaid, before the said A. A. then and there being one of the said masters of the said Court of Chancery as aforesaid, (and having such sufficient and competent power and authority as aforesaid,) falsely, knowingly, wickedly, maliciously, wilfully, and corruptly, by his own act and consent, answer, swear, and affirm in writing, (amongst other things) in substance and to the effect following, that is to say, that, (*set out so much of the answer as can be contradicted, allege a prout patet, as before, from the^o; falsify as to the conclusion, see pr. 154.*)

161. *Indictment for perjury in an affidavit made in the Court of King's Bench, in order to support a motion for a criminal information* (*q*).

That C. A. late of, &c. esquire, contriving and intending to aggrieve and injure one W. B. on, &c. in order to obtain a rule of the court of our said lord the king, before the king himself, against the said W. B. whereby it might

(*p*) A man may be indicted for perjury in swearing that he *believes* a matter to be true, which he knows to be false. Pedley's case, Leach, 277.

(*q*) *R. v. Atkinson*. See the original indictment, C. C. C.

365. which is too long, and too much involved in its own particular circumstances, to be introduced here at length; the formal part only, abstracted from the particular facts, may be of more general use.

be ordered by the said court, that a day should be given to the said W. B. to shew cause why an information should not be exhibited against him the said W. B. for certain misdemeanors, in publishing certain supposed scandalous libels concerning the said C. A. did come in his the said C. A.'s proper person into the said court of our said lord the king, before the king himself, (the said court then and still being at Westminster aforesaid, in the county of Middlesex aforesaid,) and did then and there produce to the said court a certain affidavit in writing of him the said C. A. to be exhibited to the said court for the purpose aforesaid, and then and there, before the same court, was duly sworn, and took his corporal oath upon the holy gospel of God, concerning the truth of the matters contained in the said affidavit, (the same court then and there having a lawful and competent authority to administer the same oath to the said C. A. and to take and receive the said affidavit of the said C. A.); and that the said C. A. being so sworn as aforesaid, did then and there, to wit, on, &c. at, &c. in the said county of Middlesex, in and by his affidavit aforesaid, upon his oath aforesaid, before the said court, (the said court then and there having a lawful and competent authority to administer the said oath to the said C. A. and to receive his said affidavit, (falsely, corruptly, knowingly, wilfully, and maliciously depose and swear (among other things) as follows, that is to say, (*alleging the matter sworn, the falsification, as to the conclusion, see pr. 153.*)

164. *Against a witness for perjury committed on the trial of a felon at the quarter sessions.*

That at the general quarter sessions of the peace of our lord the now king, holden at Pontefract, in and for the west riding of the county of York, on, &c. before — justices of our said lord the king, assigned to keep the peace of our said lord the king in the west riding of the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed within the riding aforesaid, one C. D. was in due form of law tried upon an indictment then and there depending against him for felony, to wit, grand larciny; and that A. B. late of,

&c. labourer, did then and there take his corporal oath, before the said justices, upon the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, concerning the matter then depending, the said justices then and there having competent power and authority to administer the said oath to the said A. B.; and that it then and there became and was a material question upon the trial of the said C. D. whether he the said A. B. did or did not, on, &c. for and on the behalf of the said C. D. offer to one E. F. the prosecutor of the said indictment, the sum of 10s. to make up the said prosecution, and that the said A. B. being duly sworn as aforesaid, did then and there falsely, corruptly, wilfully, and maliciously say, depose, and give in evidence before the said justices, that he the said A. B. did not on the — day of —, for and on the behalf of the said C. D. offer to give the sum of —l. to the said E. F. to make up the prosecution for the said felony with which the said C. D. was so charged as aforesaid; whereas in truth and in fact the said A. B. did, on the said — day of —, at S. aforesaid, offer on behalf of the said C. D. to give the sum of 10s. to the said E. F. to make up the prosecution for the said felony. And so the jurors aforesaid now here sworn and charged to inquire for our said lord the king, for the body of the said county, upon their oath aforesaid, do say, that the said A. B. at the said general quarter sessions of the peace, so holden at Pontefract aforesaid, in and for the said west riding of the county aforesaid, before the said justices, did, in manner and form aforesaid, commit wilful and corrupt perjury, against the peace, &c.

165. *For perjury in a deposition, in the Ecclesiastical Court, in a suit for defamation.*

That A. B. the wife of C. D. late of, &c. on, &c. at, &c. in her own proper person, came before E. F. then and still being surrogate in the archdeaconry court of the diocese of Exeter, and was then and there sworn as a witness on the part and behalf of one G. H. the promovent or plaintiff in a certain action or suit then depending in the said court, in which the said G. H. was promovent or plaintiff and one I. K. was the defendant; and that the said A. B. was then and there sworn, and did then and

there take her corporal oath, upon the holy gospel of God, before the said E. F. being such surrogate as aforesaid, to speak the truth touching and concerning the several matters contained in a certain libel before then exhibited in the said suit or action, he the said E. F. surrogate as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said A. B.; and that the said A. B. being so sworn as aforesaid, wilfully and maliciously devising, contriving, and intending to draw down the censures of the Ecclesiastical Court upon the said I. K. and to cause him to be excommunicated and to be put to great costs and charges, and to cause him to suffer other the pains and penalties by the said court inflicted on persons guilty of defamation, then and there did, falsely, knowingly, wilfully, wickedly, maliciously, and corruptly, by her own act and consent, depose, repeat, and acknowledge (*set out so much of the matter sworn to as can be contradicted, with averments to falsify, as to the conclusion see pr. 150, 1.*)

166. *Indictment for taking a false oath in order to obtain administration to a seaman, under stat. 31 G. 2. c. 10. s. 24 (r).*

That A. B. late of, &c. labourer, well knowing that one C. D. deceased, had served our said lord the king as a seaman on board his majesty's ship ———, being in his majesty's service, and that certain wages and pay were due to him for such service, on, &c. at, &c. came before the worshipful J. H. then surrogate to the right worshipful P. C. doctor of laws, and unlawfully, wilfully, knowingly, and feloniously, did take a false oath before the said J. H. (the said J. H. then and there having competent power and authority to administer an oath,) that the said

(r) By this stat. it is enacted, that whosoever willingly and knowingly takes a false oath to obtain the probate of any will or wills, or to obtain letters of administration in order to receive the payment of any wages, pay, or other allowances of money or prize-money

due, or that were supposed to be due, to any officer, seaman, or other person who has really served, or who was supposed to have served, on board any ship or vessel in the king's service, shall be guilty of felony without benefit of clergy.

C. D. was then dead, and that he the said A. B. was his brother, and next of kin, whereas in truth and in fact the said A. B. was not the brother of the said C. D. with intent to obtain letters of administration, in order to receive the wages and pay, due and owing to the said C. D. on account of his said service, against the form of the statute, &c. and against the peace, &c. (*2nd count stating that he, supposing wages, due, &c.*)

167. *Indictment for suborning a woman to swear a bastard child to an innocent person.*

That A. B. late of, &c. labourer, being a wicked and evil-disposed person, and minding and intending great injury to one B. R. of the said parish, and unjustly to cause and procure him to be put to great charges and expense of his monies, and to give security for the maintenance of a child, of which one A. U. spinster, was, on, &c. pregnant, and which, by the laws of this realm, was likely to be born a bastard, and to be chargeable to the said parish, did, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and wickedly solicit, instigate, persuade, and procure the said A. U. to go before one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, within the said county of B. and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, and then and there take her corporal oath and swear, before such justice, that the said B. R. was the father of such child; and that she the said A. U. did, in consequence of such solicitation, instigation, and persuasion, on, &c. at, &c. (*allege the filiation, &c. as in pr. 153.*) whereas, in truth and in fact, he the said A. B. at the time when he so endeavoured to persuade, solicit, and instigate the said A. U. to make oath and swear as aforesaid, then and there, to wit, on, &c. at, &c. well knew that the said B. R. would be put to great charges and expense of his monies, if she the said A. U. should swear as aforesaid; and whereas, in truth and in fact, he the said A. B. at the said time when he so endeavoured to persuade, solicit, and instigate the said A. U. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or

imagine that the said B. R. was the father of such child, but, on the contrary thereof, the said A. B. was then and there informed by the said A. U. that he the said A. B. was the father of such child of which she the said A. U. was so pregnant as aforesaid; and whereas, in truth and in fact, she the said A. U. never told or informed him the said A. B. that the said B. R. was the father of such child; and whereas, in truth and in fact, he the said A. B. so wickedly and unlawfully endeavoured to persuade, solicit, and instigate the said A. U. to swear as aforesaid, in order that he the said A. B. might be exonerated, freed, and discharged from divers expenses which might accrue to him, as being the father of such child, after the same should be born of the body of her the said A. U. *As to the conclusion see the former precedents.*

FRAUDS RELATING TO THE COIN.

168. *Indictment for coining copper money.*

(*Commencement as in pr. 1.*) Three pieces of false, feigned, and counterfeit copper money, each and every of them made and counterfeited to the likeness and similitude of a piece of good, legal, and current copper money of this realm, called a halfpenny, then and there, unlawfully and feloniously did make, coin, and counterfeit, against the form of the statute, &c. and against the peace, &c: (a).

(a) By the stat. 11 G. 3. c. 40. if any person shall make, coin, or counterfeit, any of the copper monies of this realm, commonly called an halfpenny or a farthing, such person, and his counsellors, aiders, and procurors, shall be adjudged to be guilty of felony.

By s. 2. to sell, take, receive, pay, or put off, any coun-

terfeit copper money, not melted down or cut in pieces, at or for a lower rate or value than the same by its denomination doth import, or was counterfeited for, is felony.

To counterfeit foreign copper money, &c. is a misdemeanor, and punishable with six months' imprisonment, under the stat. 43 G. 3. c. 139. s. 3.

169. *Indictment for putting off false copper money at a lower rate than its denomination imports.*

400 pieces of false and counterfeit copper money, each and every of them made and counterfeited to the likeness and similitude of the good, legal, and current money and copper coin of this realm, called an halfpenny, the same counterfeited pieces of copper money not being (b) then melted down or cut in pieces, then and there unlawfully and feloniously did *sell, pay, and put off* to one C. D. at a lower rate and value than the same counterfeited pieces of copper money did by their denomination import and were counterfeited for, that is to say, for one piece of current gold coin of this realm, called *an half-guinea*, being of the value of ten shillings and sixpence, against the form, &c. and against the peace, &c.

170. *Indictment for putting off counterfeit silver money (c).*

That I. A. late of, &c. labourer, and E. A. late of the

(b) See Palmer's case, p. 172. Leach, 120.

(c) By the stat. 8 & 9 W. 3. c. 26. s. 6. whoever shall take, receive, *pay, or put off**, any counterfeit milled money†, or any milled‡ money whatsoever, unlawfully diminished, and not cut in pieces, at or for a lower

rate or value than the same by its denomination doth or shall import, or was coined or counterfeited for, shall be guilty of felony§.

By the 7th sec. corruption of blood is saved.

By sec. 9. the prosecution

* These words denote an actual passing of the money, and would not be satisfied by proof of a mere tender, or an attempt to get rid of the money, which has not been accomplished. Woolridge's case, Leach, 251. East. P. C. 179.

† This statute is confined to gold and silver coin; with respect to copper coin, see the stat. 11 G. 3. c. 40. s. 2.

‡ Milling signifies the process of passing the metal through a mill or press, so as to form it into a plate of proper thickness to be cut out into pieces for stamping. All the money now current is milled, (see East. P. C. 183. 9 W. 3. c. 2.) and so called in order to distinguish it from hammered money. It is unnecessary to prove that the counterfeit money was actually milled; it is sufficient, if it resemble the genuine milled money. *R. v. Bunning*, Leach, 708. East. P. C. 183. *R. v. Dorrington*. *R. v. Larnu*, ib.

§ The punishment is burning in the hand, and imprisonment for a year, under the stat. 18 Eliz. c. 7. s. 3.

same place, wife of the said I. A. on, &c. with force and arms, at, &c. ten pieces of false and counterfeit milled money and coin, each and every of them made and counterfeited, to the likeness and similitude of a piece of good, legal, and current milled money and silver coin of this realm called a sixpence, the same counterfeited pieces of milled money, nor either of them not being then cut in pieces, then and there, unlawfully and feloniously did put off, to one *Mary Hulme* (d), spinster, and one *Peggy Nichols*, spinster, at a lower rate and value than the same counterfeited pieces of milled money did by their denomination import and were counterfeited for, (that is to say) the sum of 2s. against the form of the statute, &c. and against the peace, &c.

2nd count charges the prisoners with putting off the same counterfeit coin to the said *Mary Hulme*.

3rd count charges the prisoners with putting off the same counterfeit coin to the said *Peggy Nichols*.

171. *For putting off counterfeit silver, having at the same time counterfeit silver in possession* (e).

That *Jane*, the wife of *James Hodgson*, late of the parish

must be commenced within 3 months after the commission of the offence*.

(d) A woman was convicted at the O. B. Mich. 1702. for putting off counterfeit money to divers persons *unknown*; but Lord Holt said, that the names of the persons ought to be mentioned and laid severally. East. P. C. 180.

(e) By the stat. 8 & 9 W. 3. c. 26. s. 3. made perpetual by stat. 7 Ann. c. 23. to colour, gild, or case over †, with gold

or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling the current coin, or any round blanks of base metal, or of coarse gold or silver, of a fit size and figure to be coined, or shall gild over any silver blanks of a size and figure resembling the current gold coin, is treason.

By s. 6. persons blanching copper for sale, or mixing blanchèd copper with silver, &c. or taking or paying coun-

* The information and proceeding before the magistrate are deemed the commencement under this clause. *R. v. Wallace*, East. P. C. 186.

† To extract latent silver from the body of base metal by means of aqua fortis, is an offence within these words. *R. v. Lavey and Parker*, Leach, 182.

of Whalley, in the county of Lancaster, labourer, on, &c. with force and arms, at, &c. one piece of false and coun-

terfeit milled money, &c. are guilty of felony, and shall suffer death.

By s. 7. attainder by this act not to make corruption of blood. Ibid. By what evidence offenders may be convicted.

By stat. 15 Geo. 2. c. 28*. if any person shall wash, gild, or colour any lawful silver coin called a shilling or a sixpence, or any counterfeit or false shilling or sixpence, or add to or alter the impression, or any part of the impression, of either side of any such lawful or counterfeit shilling or sixpence, with intent to make such shilling resemble, or look like, or pass for a piece of lawful gold coin called a guinea; or with intent to make such sixpence resemble, or look like, or pass for a piece of lawful gold coin called a half-guinea; or shall file or any ways alter, wash, or colour any of the brass monies called halfpennies or farthings, or add to or alter the impression, or any part of the impression, of either side of a halfpenny or farthing, with intent to make a halfpenny resemble or look like, or pass for a lawful shilling, or with intent to make a farthing resemble or look like, or pass for a lawful sixpence, the person or persons so offending in any of the matters aforesaid, their counsellors, aiders, abettors,

and procurers, shall be adjudged to be guilty of high treason.

s. 2. And if any person shall *utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit*, to any person or persons, and shall be thereof convicted, such person so offending shall suffer six months imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time of the like offence of uttering or tendering in payment any false or counterfeit money, knowing the same to be so, such person shall, for such second offence, suffer two years imprisonment, and find sureties for his or her good behaviour, for two years more, to be computed from the end of the said first two years; and if the same person shall afterwards offend a third time in uttering or tendering in payment any false or counterfeit money, knowing the same to be so, and shall be convicted of such third offence, he or she shall be adjudged to be guilty of felony, without benefit of clergy.

s. 3. And if any person shall utter, or tender in payment, any false or counterfeit money,

* This statute is confined to the gold and silver coin of the realm, and does not extend to copper money. *Cirwan's case*, East. P. C. 182.

terfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money

knowing the same to be false or counterfeit, to any person or persons, and shall, *either on the same day, or within the space of ten days then next, utter or tender in payment any more, or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons, or shall, at the time of such uttering or tendering, have about him or her, in his or her custody, one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, then such person, so uttering or tendering the same, shall be deemed and taken to be a common utterer of false money, and being thereof convicted, shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more, to be computed from the end of the said year; and if any person having been once so convicted as a common utterer of false money, shall afterwards again utter or tender in payment any false or counterfeit money, to any person or persons, knowing the same to be false or counterfeit, then such person being thereof convicted, shall for such second offence be adjudged to be guilty of felony, without benefit of clergy.*

s. 4. And that the person or persons convicted of any of the treasons and felonies respectively hereinbefore mentioned,

shall suffer death, as in case of high treason and felony respectively; but the blood of the heirs of such offender shall not be thereby corrupted, nor shall his wife thereby lose her dower.

s. 5. And that the person and persons that shall be guilty of any of the treasons, felonies, or crimes aforesaid, shall be indicted, arraigned, tried, and convicted by such like evidence, and in such manner as is now used and allowed against any offenders for counterfeiting the lawful coin, provided that there shall be no prosecutions for any of the offences made treason or felony by this act, unless such prosecution be commenced within six months next after such offence shall be committed.

s. 8. Whoever, being out of prison, shall commit any of the offences aforesaid, and shall afterwards discover two or more persons who shall have committed any of the said offences, so as such two or more persons shall be thereof convicted, such discoverers shall have his majesty's pardon.

s. 9. If any person shall be convicted of uttering or tendering any false or counterfeit money as aforesaid, and shall afterwards be guilty of the like offence in any other county or city, the clerk of the assize, or clerk of the peace for the county or city where such first conviction was so had, shall,

and silver coin of this realm, called a shilling, as and for a piece of good, lawful, and current money and silver coin of this realm, called a shilling, unlawfully, unjustly, and deceitfully, did utter (*f*) to one M. N. spinster, she the said I. H. at the time when she so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit; and that she the said I. H. at the time when she so uttered the said piece of false and counterfeit money as aforesaid, (to wit,) on, &c. at, &c. had about her the said I. H. in the custody and possession of her the said I. H. one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a shilling, she the said I. H. then and there well knowing the said last mentioned piece of false and counterfeit money to be false and counterfeit, against the form of the stat. (*g*) &c. and against the peace, &c.

172. *For uttering a counterfeit shilling, having before been convicted as a common utterer, &c. of counterfeit money.*

Lancashire, to wit. That heretofore, to wit, at the assizes and general session of our sovereign lord the king of oyer and terminer and general goal delivery, held at

at the request of the prosecutor, or any other on his majesty's behalf, certify the same by a transcript in few words, containing the effect and tenor of such conviction; for which certificate two shillings and sixpence, and no more, shall be paid; and such certificate, being produced in court, shall be sufficient proof of such former conviction.

(*f*) This is sufficient, without proceeding to aver a tender in payment, since the stat. is in the disjunctive. *R. v. Franks*, Leach, 736.

(*g*) This indictment is founded on the stat. 15 G. 2.

c. 28. s. 3. and in order to subject the offender to the punishment imposed by the third section, it is not necessary to allege that the defendant is a common utterer of false money, since this is a conclusion of law which arises upon the facts stated. *Scott's case*, Leach, 1001. *Smith's case*, 2 Bos. & Pul. 127. But it is not sufficient, in an indictment on this section, to allege two utterings on the same day in different counts, they must both be alleged in the same count. *R. v. Tandy*, Leach, 970. *East P. C.* 182.

the Castle of Lancaster, in and for the county palatine of Lancaster, on Tuesday the 26th day of March, in the 45th year of the reign of our sovereign lord George the Third, by the grace of God of the united kingdom of Great Britain and Ireland king, defender of the faith, before his majesty's well-beloved and faithful counsellor Edward Lord Ellenborough, chief justice of our said sovereign lord the king of his majesty's Court of King's Bench, at Westminster, and his majesty's trusty and well-beloved Sir Robert Graham, knight, one of the barons of our said sovereign lord the king, of his majesty's Court of Exchequer, at Westminster, and others their companions, justices and commissioners of our said sovereign lord the king, by virtue of letters patent of our said sovereign lord the king; I. H. by the name and description of I. H. late of the parish of Blackburn, in the county of Lancaster, labourer, was in due form of law tried and convicted by a certain jury of the country, duly taken and sworn, between our said lord the king and the said I. H. in that behalf, upon a certain indictment then and there depending against him the said I. H.; for that he the said I. H. on the 19th day of August, in the 44th year of the reign of our sovereign lord George the Third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm called a shilling, as and for a piece of good, lawful, and current money and silver coin of this realm called a shilling, unlawfully, unjustly, and deceitfully, did utter to one R. W. he the said I. H. at the time when he so uttered the said piece of false and counterfeited money, then and there well knowing the same to be false and counterfeit; and that he the said I. H. afterwards, to wit, on the same 19th day of August, in the 44th year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm called a shilling, as and for a piece of good, lawful, and current money and silver coin of this realm called a shilling, unlawfully, unjustly, and

deceitfully did utter to one R. B. he the said I. H. at the time when he so uttered the said last-mentioned piece of false and counterfeit money then and there well knowing the same to be false and counterfeit, against the form of the statute, &c. and against the peace, &c. And that the said I. H. on the said 19th day of August, in the 44th year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a shilling, as and for a piece of good, lawful, and current money and silver coin of this realm called a shilling, unlawfully, unjustly, and deceitfully did utter to one T. A. he the said I. H. at the time when he so uttered the said last mentioned piece of false and counterfeit money then and there well knowing the same to be false and counterfeit, against the form, &c. and against the peace, &c. ; and thereupon it was considered by the court there, that the said I. H. should be imprisoned in his majesty's goal in the Castle of Lancaster aforesaid, for and during the term of twelve months, and that, at the expiration of that time, he should find sureties for his good behaviour for two years, as by the record thereof doth more fully appear. And the jurors aforesaid, now here sworn and charged to inquire for our said lord the king for the body of the said county of Lancaster, upon their oath aforesaid, do further present, *that the said I. H. having been so convicted as a common utterer of false money*, afterwards, to wit, on the 15th day of May, in the 53rd year of the reign of our sovereign lord George the third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms, at the parish of Whalley, in the county aforesaid, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a shilling, as and for a piece of good, lawful, and current money and silver coin of this realm, called a shilling, unlawfully, unjustly, deceitfully, and feloniously did utter to one A. H. spinster, he the said I. H. at the time when he so uttered the said last-mentioned piece of false and counterfeit money, then and there

well knowing the same to be false and counterfeit, against the form, &c. and against the peace, &c.

(2nd count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, &c. (*the former conviction is here set out again, as in the first count.*) And the jurors aforesaid, now here sworn and charged to inquire for our said lord the king for the body of the said county of Lancaster, upon their oath aforesaid, do further present, *that the said I. H. having been so convicted as aforesaid, afterwards, to wit, &c. (as in the first count.)*

173. *Indictment for coining bank tokens (h).*

(*Comm. as in pr. 1.*) Feloniously did make, coin, and counterfeit, and cause and procure to be made, coined,

(h) By the stat. 52. G. 3. c. 138. reciting that the governor and company of the bank of England, had caused to be coined, stamped, and circulated, a large quantity of silver dollars, containing; on the obverse side thereof, an impression of his majesty's head, and the following words and letters, *videlicet*, "*Georgius III. Dei gratia rex*," and on the reverse side thereof the impression of Britannia and the following words and figures, *videlicet*, "*Five shillings, dollar, bank of England, 1804*"; and that the said governor and company had also issued and circulated, for the convenience of the public, a quantity of silver pieces, denominated tokens, for the respective sums of three shillings and one shilling and sixpence, such tokens for the sum of three shillings, containing on the obverse side thereof, an impression of his

majesty's head and the following words and letters, *videlicet*. "*Georgius III. Dei gratia rex*," and on the reverse side thereof the following words and figures, *videlicet*, "*Bank token, 3 shill.*" with the addition of the year in which the same were respectively made and stamped; and such tokens for the sum of 1s. 6d. containing the same impression, words, and letters on the obverse side thereof, as upon the said token for 3s. and on the reverse side thereof the following words and figures, *videlicet*, "*Bank token 1s. 6d.*" with the addition of the year in which the same were respectively coined and stamped; and reciting further the intention, other like tokens for the sum of 3s. and 1s. 6d. it is *enacted*, that if any person &c. shall make, coin, or counterfeit, or cause or procure, &c. or willingly act or assist in the making, &c. any coin,

and counterfeited, and did willingly act and assist in the making, coining, and counterfeiting one medal, con-

medal, or device whatsoever, resembling, or made with intent to resemble or look like any of the said dollars or tokens, or any of them, or to pass as such, every person so offending, and being thereof convicted by due course of law, shall be deemed and adjudged to be guilty of felony, and shall be transported for fourteen years.

By sec. 2. if any person shall utter, offer, or tender in payment, or sell or give in exchange, or pay or put off, to any person or persons, any such false or counterfeit dollar or dollars, token or tokens, as aforesaid, knowing, &c. and shall, either on the same day, or within the space of 10 days then next afterwards, utter, offer, &c. any more or other such counterfeit dollar, &c. knowing the same, &c. to the same or to any other person or persons, or shall at the time of such first uttering, &c. have in custody or possession one or more such counterfeit dollar, &c. or any piece or pieces of counterfeit money whatsoever, besides what was or were so uttered, &c. such person, &c. shall be deemed and taken to be a common utterer of such counterfeit dollars, &c. and being thereof convicted, shall suffer one year's imprisonment, and shall find sureties, &c. for two years more. Upon a second conviction of such offence, the offender to be

deemed and adjudged to be guilty of felony, and to be transported for the term of 14 years.

By sec. 3. persons guilty, discovering offenders, not liable to prosecution.

By sec. 4. a certificate of conviction in another county, by the clerk of assize, &c. in that county, &c. shall, at the request of the prosecutor or any person on his majesty's behalf, be sufficient proof of such former conviction.

The same statute, s. 9. reciting, that divers frauds have been practised by making and publishing papers with certain words and characters so nearly resembling the notes and bills of the governor and company of the Bank of England, as to appear to ignorant and unwary persons, to be the notes and bills of the said governor and company, enacts, that if any person shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon wood, or any other materials, or upon any plate whatsoever, any word or words, figure or figures, cha-

taining on the obverse side thereof, an impression of the head of his majesty our said lord the king, and the following words and letters, *videlicet*, "*Georgius III. Dei gratia rex*," and on the reverse side thereof the following words and figures, *videlicet*, "Bank token, 3 shill. 1812." resembling, and made with intent to resemble and look like silver pieces denominated tokens, issued and circulated by the governor and company of the bank of England for the convenience of the public, in pursuance of and by virtue of the statute in that case made and provided, for the sum of three shillings each, against the form of the statute, &c. and against the peace, &c.

In a second count describe the counterfeit as a certain device resembling and made with intent to resemble and look like silver pieces denominated tokens, issued and circulated, &c. (as before.)

racter or characters, the impression taken from which shall resemble, or be apparently intended to resemble the whole or any part of any of the notes or bills of the said governor and company, commonly called bank notes and bank post bills, or shall contain any word, number, figure, or character, in white, on a black, sable, or dark ground, without any authority in writing for that purpose from the said governor and company, to be produced and proved by the party accused, or shall, without such authority as aforesaid, use any such plate, wood or other material so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the making or printing upon any paper, or other material, any word or words, figure or figures, character or characters, which shall be appa-

rently intended to resemble the whole or any part of any of the said notes or bills of the said governor and company, or any word, number, figure, or character, in white, on a black, sable, or dark ground, or if any person or persons shall, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate, instrument, or device, or shall knowingly and wilfully utter, publish, and dispose of, or put away, any paper, or other material; containing any such word or words, figure or figures, character or characters, as aforesaid, without lawful excuse, the proof whereof shall lie upon the party accused, every person so offending, in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years.

174. *Indictment for buying guineas (i).*

(*Commencement as in pr. 1.*) Unlawfully did pay to one R. R. for five pieces of gold coin, lawfully current within

By the stat. 51 G. 3. c. 110. sec. 2. to bring counterfeited tokens into the kingdom, with intent to utter them, is felony. And by s. 3. to offer or tender in payment, or give in exchange, or pay or put off, such counterfeit tokens, knowing &c. is a misdemeanor punishable by fine and imprisonment. The third offence to be deemed felony.

Bank tokens prohibited to be circulated by 57 G. 3. c. 117. and 58 G. 3. c. 14.

(i) See the stat. 52 G. 3. c. 50. continued by stat. 53 G. 3. c. 5. until the 25th of March, 1814. By the st. 56 G. 3. c. 68. s. 13. perpetual, no person shall by any means, device, shift, or contrivance whatsoever, receive or pay for any gold coin lawfully current within the *united kingdom*, any more or less in value, benefit, profit, or advantage than the true lawful value which such gold coin doth or shall by its denomination import, nor shall utter or receive any piece or pieces of gold coin of this realm, at any greater or higher rate or value, nor at any less or lower rate or value than the same shall be current for in payment according to the

rates and values declared and set upon them pursuant to law; and that every person who shall offend herein, shall be deemed and adjudged guilty of a misdemeanor, and being thereof convicted by due course of law, shall suffer six months imprisonment, and find sureties for his good behaviour for one year more, to be computed from the end of the said six months. Upon a second conviction for a like offence, the offender liable to one year's imprisonment, and to find sureties for one year more, to be computed from the end of the last-mentioned year; a third, and every subsequent conviction, punishable by two years imprisonment.

By sec. 15. indictments upon this act shall not be traversed to any subsequent assizes or sessions.

By sec. 16. it is unnecessary on any prosecution or trial of any offender or offenders hereafter to be prosecuted or tried for any offence against this act, to prove that the gold coin received or paid or uttered contrary to this act, is the current gold coin of this realm, but the same shall be deemed and taken so to be, received

this *realm* (*k*), called guineas, by their denomination importing to be of the value of five pounds and five shillings more in value, benefit, profit, and advantage, than the true lawful value which such pieces of gold coin, by their denomination, imported to be of, to wit, one piece of silver coin, of lawful money of Great Britain, called a shilling, of the value of one shilling, 22 pieces of silver coin, called Spanish dollars, of the value of 5s. 6d. each, one piece of silver coin, called a Spanish half-dollar, of the value of 2s. 6d. and one piece of silver coin called an American half-dollar of the value of 2s. 6d. against the form of the statute, &c. and against the peace, &c.

(*Second count. Commencement as in pr. 7.*) Unlawfully did pay to the said R. R. for five other pieces of gold coin lawfully current within this *realm* (*k*), called guineas, by their denomination importing to be of the value of 5l. 5s. more in value, benefit, profit, and advantage, than the true lawful value which such last mentioned five pieces of gold coin, by their denomination imported to be of, to wit, one pound and two shillings more in value, benefit, profit, and advantage, than the true lawful value of such last-mentioned five pieces of gold coin, that is to say, he the said D. W. did then and there pay for the last-mentioned five pieces of gold coin, to the said R. R. one other piece of silver coin, of lawful money, &c. (*as in the first count.*)

(*Third count.*) Unlawfully did pay to the said R. R. for five other pieces of gold coin lawfully current within this *realm* (*k*), called guineas, by their denomination importing to be of the value of 5l. 5s. one other piece of silver coin of lawful money of Great Britain, called a shilling, of the value of one shilling, 22 other pieces of silver coin, called Spanish dollars, of the value of 5s. 6d. each, one other piece of silver coin, called a Spanish half-dollar, of the value of 2s. 6d. and one other piece of silver coin, called an American half-dollar, of the value of

or paid or uttered as such, until the contrary thereof shall be proved to the satisfaction of the judge, justice, or court before whom any such offender

or offenders shall be prosecuted or tried.

(*k*) In the stat. "*united kingdom.*"

2s. 6d. being more in value, benefit, profit, and advantage, to wit, to the amount of 1l. 2s. more in value, benefit, profit, and advantage, than the true lawful value which such last-mentioned five pieces of gold coin, called guineas, by their denomination imported to be of, against the form, &c. and against the peace, &c.

(*Fourth count.*) Unlawfully did pay to the said R. R. for five pieces of gold coin, lawfully current within this realm, called guineas, by their denomination importing to be of the value of 5l. 5s. more in value, benefit, profit, and advantage, than the true lawful value, which such last-mentioned five pieces of gold coin, called guineas, imported to be of, that is to say, 1l. 2s. more in value, benefit, profit, and advantage, than the true lawful value of such last-mentioned pieces of gold coin, the said last-mentioned value, benefit, profit, and advantage, then and there being paid, partly in a certain piece of lawful silver money of Great Britain, and partly in certain foreign silver coin, against the form, &c. and against the peace, &c.

175. *Against a bankrupt for a fraudulent concealment of his effects (1).*

Yorkshire, to wit. The jurors for our lord the king, upon their oath present, that I. S. late of Alverthorpe, in the parish of Wakefield, in the county of York, clothier, dealer and chapman, on the 23rd day of September, in the 50th year of the reign of our sovereign lord George the Third, by the grace of God, of the united kingdom of Great Britain and Ireland, king, defender of the faith, was, and for a long time, to wit, for the space of six months and more before then had been and was a clothier, dealer and chapman, and for all that time *did use and exercise the trade of merchandize, by way of bargaining, exchange, bartering, and chevizance*, and did seek his trade of living by buying and selling, to wit, at A. aforesaid, in the county of Y. aforesaid, and that the said I. S. so as

(1) Under the stat. 5 G. 2. executed, York Spring Ass.
c. 30. s. 1. upon this indictment 1813.
the prisoner was convicted and

aforesaid using and exercising the trade of merchandize, by way of bargaining, exchange, bartering, and chevizance, and seeking his trade of living by buying and selling as aforesaid, on the said 23rd day of September, in the 50th year of the reign aforesaid, at A. aforesaid, in the county of Y. aforesaid, *became and was indebted* to I. D. in the sum of 100*l.* and upwards, for a just and true debt, and being so indebted, and so using and exercising the trade of merchandize by way of bargaining, exchange, bartering, chevizance, and seeking his trade of living by buying and selling as aforesaid, he the said I. S. on the said 23rd day of September, in the 50th year aforesaid, at A. aforesaid, in the county of Y. aforesaid, *became a bankrupt* within the intent and meaning of the several statutes made and then and yet in force concerning bankrupts or some or one of them, and that afterwards, to wit, on the 1st day of October, in the 50th year of the reign aforesaid, the said I. D. then being such creditor of the said I. S. as aforesaid, and the said I. S. being indebted to him as aforesaid, on PETITION of the said I. D. as well for himself as for all other the creditors of the said I. S. made and exhibited in writing to the Right Hon. John Lord Eldon, then being lord high chancellor of Great Britain, a certain commission of our lord the king, sealed with the *great seal of the united kingdom (m)* of Great Britain and Ireland, founded upon the statutes made and provided against bankrupts, was duly *awarded and issued out (n)* by the said lord high chancellor, to wit, at Westminster, in the county of Middlesex, and to the jurors aforesaid now here shewn, bearing date at Westminster, the said 1st day of October, in the 50th year of the reign aforesaid, directed to I. P., H. I. M., esqrs. I. L., I. B., and I. L. P., gents. in and by which said commission our said lord the king did name, assign, appoint, constitute, and ordain them the said I. P., H. I. M., esqrs. I. L., I. B., and I. L. P., gents. the special com-

(m) It seems that it would be sufficient to aver, that the commission was sealed with the great seal of Great Britain. See *R. v. BaRock*, 1 Taunt. 71.

(n) The words of the stat. It is not sufficient merely to aver, that the commission was *awarded*. *Frith's case*, Leach.

missioners of our said lord the king thereby giving full power and authority to them four or three of them the said I. P. H. or I. M. to be one to proceed according to the statutes in the said commission mentioned, and all other statutes in force concerning bankrupts, not only concerning the said bankrupt, his body, lands, tenements, freehold, and customary goods, debts, and other things whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise, did or should offend touching the premises, or any part thereof, contrary to the true intent and meaning of the said statutes, and to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the creditors of the said I. S. as towards and for all other intents and purposes, according to the ordinance and provision of the same statutes, willing and commanding them four or three of them, the said I. P. H. or I. M. to be one to proceed to the execution and accomplishment of that our said lord the king's commission, according to the true intent and meaning of the said statutes, with all diligence and effect, as by the said commission doth more fully appear; and that afterwards, to wit, on the 4th day of October, in the 50th year aforesaid, to wit, in the parish of W. aforesaid, in the county of Y. aforesaid, the major part of the said commissioners, in the said commission named, to wit, the said I. P. H., I. B., and I. L. P. administered to, and severally took before each other the oath of a commissioner of bankrupts, prescribed and specified by an act of parliament, made in the fifth year of his late majesty King George the 2nd, entitled, "An act to prevent the committing of Frauds by Bankrupts," before they proceed to act in the execution of the said commission, according to the direction of the said act, and required to be taken by such commissioners, and did then and there respectively sign a memorial thereof, as by the said memorial by them the said commissioners entered and kept among the depositions and other proceedings on the said commission doth appear; and that afterwards, to wit, on the said 4th day of October, in the 50th year aforesaid, to wit, in the parish of W. aforesaid, in the county of Y. aforesaid, the major part of the said commissioners in the said commission named and appointed and authorized, to wit, the said I. P. H., I. B., and I. L. P.

did proceed and under and in the execution of the said commission, did then and there find that the said I. S. did, and before the date and issuing forth of the said commission against him, become bankrupt within the true intent and meaning of the several statutes made and then in force concerning bankrupts or some or one of them, and did then and there duly adjudge and declare the said I. S. bankrupt accordingly. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 4th day of October, in the 50th year of the reign aforesaid, notice in writing, signed by them the said I. P. H., I. B., and I. L. P. the major part of the said commissioners in the said commission named, appointed, and authorized, was, according to the direction of the statute in such case made and provided, delivered to the said I. S. personally, to wit, at the parish of W. in the county of Y. aforesaid, that the said commission of bankrupt had been issued against him the said I. S. and that he had been thereupon declared bankrupt; and the said I. S. was by them the said commissioners last named, thereby required and commanded personally to be and appear, and surrender himself to and before the major (o) part of the commissioners in the *said commission named*, on the 31st day of October, in the 51st year of the reign aforesaid, the 1st day of November the same year, and the 20th day of November the same year, at 12 of the clock at noon of each of the said days, at the sessions house in W. aforesaid, in the said county of Y. then and there to be examined according to the directions of the statute made in the 5th year of the reign of his late majesty king George the 2nd, intituled an act to prevent the committing of frauds by bankrupts, and thereupon to make full discovery and disclosure of all his estates and effects, and in all things to conform himself to the several statutes made concerning bankrupts; and afterwards to wit, on the 9th day of October, in the 50th year of the reign aforesaid, notice was also given and published in the London Gazette, to wit, at the parish of W. aforesaid, in the county of Y. aforesaid, that a commission of bankrupt was awarded and

(o) These words are essential in an indictment for not surrendering. Frith's case, Leach, 12.

issued forth against the said I. S. and that he, being declared a bankrupt, was thereby required to surrender himself to the said commissioners in the said commission named, *or the major part of them (p)*, on the said 31st day of Oct. in the 51st year of the reign aforesaid, the 1st and 20th days of Nov. in the same year, at 12 of the clock at noon of each of those days, at the sessions house in W. and make a full discovery and disclosure of his estate and effects, and at the last sitting the said bankrupt was thereby required to finish his examination. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 31st day of Oct. in the 51st year of the reign aforesaid, the major part of the said commissioners named, authorized, and appointed in and by the said commission, to wit, the said I. P. H., I. B., and I. L. P., did meet at the sessions house in W. in the county of Y. aforesaid, and did proceed under and in execution of the said commission *, and they the said last-mentioned commissioners did then and there examine the said I. S. and the said I. S. then and there appeared and submitted himself to be examined by the said last-mentioned commissioners; but not being then and there prepared to make a full disclosure and discovery of his estates and effects, then and there desired further time for doing thereof, which was then and there granted to him accordingly **, and that afterwards, to wit, on the said 1st day of November, in the 51st year of the reign aforesaid, at the sessions house in W. aforesaid, the major part of the commissioners named and authorized in and by the said commission, to wit, the said I. P. H., I. B., and I. L. P. did meet pursuant to the said notice, and did proceed under and in the prosecution of the said commission *, and that the said I. S. did not make any disclosure or discovery of his estate and effects **. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 20th day of Nov. in the 51st year aforesaid, at the sessions house, also called the new court house, in W. aforesaid, in the county of Y. aforesaid, the major part of the said commissioners named, appointed, and authorized in and by the said commission, to wit, the

(p) This is necessary in an indictment for not surrendering, see Leach, 15.

said I. P. H., I. B., and I. L. P. did meet in pursuance of the said notices, and did proceed under and in execution of the said commission; * and the said I. S. then and there appeared and submitted himself and was examined by the said last-mentioned commissioners touching his estate and effects, but the said bankrupt not being able satisfactorily to answer all such questions as the said last-mentioned commissioners had put to him touching his the said I. S.'s estate and effects, without a further investigation of his books and papers, they the said last-mentioned commissioners did therefore ** then and there adjourn the said bankrupt's last examination until the 21st day of November inst. at that place at 12 of the clock at noon of the same day, at which time and place, that is to say, on the said 21st day of November, in the 51st year of the reign aforesaid, at the sessions house at W. aforesaid, in the county of Y. aforesaid, the major part of the said commissioners named, appointed, and authorized in and by the said commission, to wit, the said I. P. H., I. B., and I. L. P., did meet and did proceed under and in the execution of the said commission, and thereupon the said I. S. then and there duly appeared before the said last-mentioned commissioners in order to finish his examination, pursuant to the said notice in the London Gazette for that purpose given, and they the said last-mentioned commissioners did then and there enter into the final examination of him the said I. S. pursuant to the said notice*, and the said I. S. did then and there upon his corporal oath, the said last-mentioned commissioners then and there having sufficient and competent power and authority to administer the same oath to the said I. S. in that behalf, say, depose, and swear, (amongst other things,) that the book marked A. which was then produced and delivered up by the said I. S. with the goods and things seized by and under the said commission, did contain and were a full and true disclosure and discovery of all his the said I. S.'s estate and effects, both real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he had disposed of, assigned, or transferred any of his goods, wares, and merchandizes, money, or other estate and effects, and all books, papers, and writing relating thereto, of which he was possessed, or to which he was any ways interested or intitled, or which any person or persons be

fore or had then had in trust for him or to his use, at any time before or after the issuing of the said commission, or whereby the said I. S. or his family had, or might have or expect, any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his estate and effects as had been really and *bonâ fide* before sold and disposed of in the way of his trade and dealings, and except such sums of money as had been laid out in the ordinary expense of himself and family, and that at the time of that, his the said I. S.'s examination, he had delivered up to the said commissioners named, or the major part of them, or unto the assignees chosen under the said commission, all such part of his goods, wares, and merchandizes, money, estate, and effects, and all books, papers, and writings, relating thereto, as were then in his custody, possession, or power, the necessary wearing apparel of himself and children only excepted; and the said I. S. then and there further said, that he had not removed, concealed, or embezzled any part of his estate, real or personal, or any books of accounts, papers, or writings relating thereto, with an intent to defraud his creditors; and that the said I. S. then and there further said, that he had got two stalls in the cloth hall at Leeds, and that since his bankruptcy his wife paid to M. M. out of money belonging to the said I. S. the sum of 39l. and upwards, to take up a returned bill*. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said I. S. did not, upon such his said examinations, as aforesaid, or either of them, before the major part of the said commissioners in the said commission named, appointed, and authorized, after the said I. S. became bankrupt, and after the issuing of the said commission as aforesaid, fully and truly disclose and discover all his estate and effects of which he was possessed, or to which he was interested or intitled before or after the time of the issuing of the said commission as aforesaid against him, except such part of his estate and effects as had been really and *bonâ fide* sold and disposed of in the way of his trade and dealings, and except such sums of money as had been laid out in the ordinary expenses of his family; nor did he the said I. S. upon such his said last examination, or before or afterwards, deliver up to the said commissioners, or the major part of them, or unto the assignees, chosen under the said commission, all such part of his goods, wares, and merchandizes, money, estate and effects, and all books, papers, and writings relat-

ing thereto, as were at the time of his said examinations or either of them, in his *custody, possession*, or power, (the necessary wearing apparel of himself, his wife, and children only excepted,) but he the said I. S. not regarding the laws and statutes of this realm, nor the pains and penalties therein contained, after he became a bankrupt, and after the issuing of the said commission against him, and after he was so adjudged and declared a bankrupt as aforesaid, and had notice thereof as aforesaid, to wit, on the 21st day of November, in the 51st year of the reign aforesaid, in the parish of W. aforesaid, in the county of Y. aforesaid, wilfully, fraudulently, and feloniously, and with intent to defraud his the said I. S.'s creditors in that behalf, did conceal and embezzle part of his said personal estate, to the value of £0 pounds and more, the same or any part thereof not being the necessary wearing apparel of himself, his wife, or children, that is to say, (*set out the goods*,) with intent to defraud his the said I. S.'s creditors, against the form, &c. and against the peace, &c.

(*2nd count, in describing the commission, alleges that,* "a certain commission under the great seal, founded upon the statutes made and provided against bankrupts, was duly awarded and issued out against the said I. S. by the name and description of, &c. bearing date at Westminster, on, &c." omits the averment that the commissioners took the oath, &c. omits also to allege the appearance of I. S. on the first examination, as from * to **, omits to negative any disclosure on the second examination, as from * to **, omits to allege the appearance and examination of I. S. on the third examination, as from * to **; and in stating the last examination, after the * alleges, "and the jurors, &c. the said I. S. did not, upon such his said last examination, or afterwards, or at any time whatsoever, before the major part of the said commissioners in the said last-mentioned commission named and authorised," and proceeds as in the 1st count, from the §, p. 574.

3rd count states the trading, the debt, the becoming a bankrupt, that a commission was duly awarded and issued out, directed to, &c. whereupon, he was, by the major part, &c. duly declared to be a bankrupt—notice to the bankrupt—notice in the Gazette—the appearance on the 21st, until which day the final examination of him the said I. S. was duly adjourned and postponed—and the

omission to disclose and discover, &c. then or within 42 days after the said notice, or at any time or place, &c. as in the first count.

MALICIOUS MISCHIEF.

176. *Indictment, under the Black Act, for breaking down the head and mound of a fish-pond, whereby the fish were lost (a).*

(*Commencement as in pr. 1.*) The head and mound of a certain fish-pond, in a certain orchard belonging to M. N. there situate and being unlawfully, *maliciously (b)*, and feloniously, did break down, whereby the fish in the same pond then and there being, were then and there lost and destroyed, to the great damage, &c. against the form &c. and against the peace, &c.

177. *For maliciously cutting down trees, &c. (c).*

(*Commencement as in pr. 1.*) Unlawfully, maliciously,

(a) Under the stat. 9 G. 1. c. 22. see note, p. 464. This stat. prescribes a peculiar mode of compelling offenders against it to appear: upon information upon oath, before two or more justices, of such offence committed, such justices shall certify such information to one of the principal secretaries of state; upon which his majesty in privy council may make an order, requiring the offender to surrender within the space of 40 days, to any justice of the K. B. or of the peace; such order to be published, &c. and proclaimed,

&c. and in case the offender neglect, &c. he shall be adjudged to be convicted and attainted of felony.

(b) The malice must be personal against the owner of the property. *Pearce's case*, 2 Leach, 594. *Kean's case*, ib. 595. 609. *Shepherd's case*, Leach, 609. *Ranger's case*, East. P. C. 1074.

(c) Under the same stat. see note, p. 464.

The stat. 6 G. 3. c. 36. reciting that divers persons had of late years wilfully and maliciously cut down, barked, or otherwise destroyed timber.

and feloniously did cut down and destroy ten ash trees, planted in a certain avenue to the dwelling-house of one M. N. and then growing for ornament there, (he the said M. N. then and there being the owner (*d*) of the said trees), to the great damage of the said M. N. against the form, &c. and against the peace, &c.

trees, &c. enacts, that every person who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any oak, beech, ash, elm, fir, chesnut, or asp, timber tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained, shall be deemed and be construed to be guilty of felony, and liable to be transported for 14 years; aiders, abettors, and receivers, to be liable to the same punishment.

By stat. 6 G. 3. c. 48. every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away, any timber tree or trees, or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner or owners thereof first had or in any of his majesty's forests or chases, without the consent of the surveyor or surveyors, or his or their deputy or deputies, or person or persons entrusted with the care of the same, shall on conviction, forfeit not exceeding 20*l*.

&c. together with the charges of such conviction; and upon non-payment thereof, be imprisoned, &c.; for a second offence, not exceeding 30*l*. &c.; and if he shall be guilty of the like offence, a third time, and shall be convicted thereof in like manner, shall be guilty of felony, and the court shall have authority to transport him for seven years.

By sec. 2. all oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, shall be taken to be timber trees, within the meaning of the act; and so by stat. 13 G. 3. c. 33. are poplar, alder, larch, maple, or hornbeam.

Under the former of these acts, the offence, to amount to a felony, must be committed in the *night-time*, and the tree must be of the value of 5*s*.; otherwise it amounts to no more than a misdemeanor, punishable under the latter act, unless indeed the offence be repeated after a second conviction. See *R. v. Hitchcock and Howe*, East. P. C. 588.

(*d*) The name of the owner is essential. See *R. v. Patrick and Pepper*, Leach, 287. and *supra*, p. 207.

178. *Indictment for forcibly rescuing a person from a constable, charged with feloniously sending a letter, without a name subscribed, demanding money.* (e)

That on, &c. at, &c. one C. D. was brought by E. F. then being one of the constables of the same parish before M. N. Esq. then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county; and that the said C. D. then and there was charged upon the oath of G. H. with feloniously, knowingly, and maliciously sending a certain letter, without any name subscribed thereto, to E. A. demanding money from the said E. A. and the said C. D. was then and there examined before the said M. N. the said justice, touching and concerning the aforesaid felony, and thereupon the aforesaid M. N. the said justice, then and there, in due form of law, did make a certain warrant under his hand and seal, bearing date, &c. directed, &c. (*set out the warrant*) which said warrant, afterwards, to wit, on, &c. at, &c. was delivered to the said E. F. then and there being an officer, that is to say, then and there being one of the constables of the said parish, and the said E. F. him the said C. D. in his custody, by virtue of the said warrant, and for the cause aforesaid, then and there had; and that the said C. D. late of, &c. labourer, A. B. late of the same, labourer, afterwards, to wit, on &c. with force and arms, at, &c. in and upon the said E. F. (then and there being constable as aforesaid, and then and there lawfully having the said C. D. in his custody, by virtue of the said warrant, for the cause aforesaid,) in the peace of God and our said lord the king, and in the due execution of his said office, then and there being, *feloniously* did make an assault; and that the said A. B. the said C. D. out of the custody of the said E. F. and against the will of him the said E. F. then and there, with force and arms, unlawfully, forcibly, and feloniously, did rescue and put at large, to go where he

(e) Under the Black Act, 9 G. 1. c. 22. s. 1. see p. 464.

would, to the great hindrance of justice, in contempt of our said lord the king and his laws, against the form, &c. and against the peace, &c.

179. *Indictment for feloniously and maliciously killing a gelding (f).*

One black gelding, of the price of fourteen pounds, of the goods and chattels of one C. D. in a certain field belonging to him the said C. D. then and there being, feloniously, unlawfully, wilfully, and *maliciously* (g), then and there did kill and destroy, to the great damage of him the said C. D. against the form, &c. and against the peace, &c.

180. *Indictment for maliciously wounding a cow (f).*

One cow, of the price of seven pounds, of the goods and chattels of C. D. then and there being, feloniously, unlawfully, wilfully, and *maliciously* (g) did wound, to the great damage of the said C. D. against the form, &c. and against the peace, &c.

181. *For maiming a gelding (f).*

With a certain sharp instrument, called a bill-hook, made of iron and steel, which he the said A. B. in his right hand then and there had and held, feloniously, unlawfully, wilfully, and *maliciously* (h), did strike a certain gelding, then and there being, of the price of twenty pounds, of the goods and chattels of C. D. in and upon the left shoulder of the said gelding, giving to the said gelding thereby, by such striking as aforesaid, in and upon the said left shoulder of the said gelding, one deep wound of the breadth of five inches, and of the depth of four inches, and thereby did then and there feloniously, unlawfully, wilfully, and maliciously, maim and wound

(f) Under the same stat. see p. 439. The word *cattle* includes sheep and horses, which are expressly mentioned in stat. 22 & 23 C. 2. c. 7. see East. P. C. 1074.

(g) The malice must be personal against the owner, see p. 351. b. (b).

(h) Under the same stat. see p. 464. See East. P. C. 1077.

the said gelding, against the form, &c. and against the peace, &c.

182. *Indictment for cutting with intent to resist the lawful apprehension of the defendant for an offence (i).*

That T. R. late of the township of B. in the county of

(i) By 43 G. 3. c. 58. s. 1. it is enacted, that if any person or persons shall, either in England or Ireland, wilfully, maliciously, and unlawfully shoot at any of his majesty's subjects; or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire arms at any of his majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons; or shall wilfully, maliciously, and unlawfully stab or cut any of his majesty's subjects with intent in so doing, or by means thereof, to murder, or rob, or to maim, disfigure or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his majesty's subject or subjects, or with intent to obstruct, resist, or prevent the lawful apprehension and detainer of the person or persons so stabbing or cutting, or the lawful apprehension and detainer of any of his, her, or their accomplices, for any offences for which he, she, or they may be respectively liable by law to be apprehended, imprisoned, or detained; or shall wilfully, maliciously, and un-

lawfully administer to, or cause to be administered to or taken by any of his majesty's subjects, any deadly poison, or other noxious or destructive substance or thing, with intent such his majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman then being quick with child; that then and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be and are thereby declared to be felons, and shall suffer death as in cases of felony, without benefit of clergy.

Provided always, that in case it shall appear on the trial of any person or persons indicted for the wilfully, maliciously, and unlawfully shooting at any of his majesty's subjects, or for wilfully, maliciously, and unlawfully presenting, pointing, or levelling any kind of loaded fire arms, at any of his majesty's subjects, and attempting, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or for the wilfully, maliciously, and unlawfully stabbing or cutting any of his majesty's

Lancaster, labourer, on, &c. with force and arms, at the township of Blackburn, in the county of L. in and upon one C. S. a subject of our said lord the king, then and there being, feloniously, wilfully, maliciously, and unlawfully, did make an assault, and with a *certain sharp (k) instrument* then and there feloniously, wilfully, maliciously, and unlawfully, did strike and cut the said C. S. in and upon the left hand of him the said C. S. with intent, in so doing, wilfully, maliciously, and feloniously, to obstruct, resist, and prevent the lawful apprehension and detention of him the said T. R. *for a certain offence, to wit, for the felonious stealing, taking, and carrying away of 100 pounds weight of cotton twist, of the value of twenty shillings, of the goods and chattles of the said C. S. before then feloniously stolen, taken, and carried away by him the said T. R. to wit, at the township*

subjects, with such intent as aforesaid; that such acts of stabbing or cutting were committed under such circumstances as that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, that then and in every such case the person or persons so indicted shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted.

And by sec. 2. it is enacted that if any person or persons, from and after the said first day of July, in the said year of our Lord 1803; shall wilfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever; or shall use or employ, or cause or procure to be used or employed, any instrument or other means whatsoever, with

intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things, or using such means; that then and in every such case the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be, and thereby are declared to be guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publicly or privately whipped, or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years, at the discretion of the court before which such offender shall be tried and convicted.

(k) These words are usually inserted, but are not contained in the purview of the act.

aforesaid, in the county aforesaid, for which said offence, he the said T. R. was then and there liable by law to be apprehended, imprisoned, and detained, to the great damage of the said C. S. against the form of the stat. &c. and against the peace, &c.

(*Second count.*) And the jurors, &c. that the said T. R. heretofore, to wit, on, &c. with force and arms, at, &c. in and upon the said C. S. feloniously, wilfully, maliciously, and unlawfully, did make an assault with a *certain sharp (l) instrument, to wit, a knife*, and then and there feloniously, wilfully, maliciously, and unlawfully, did strike and cut the said C. S. in and upon the left hand of him the said C. S. with intent in so doing, feloniously, wilfully, maliciously, and unlawfully, to obstruct, resist, and prevent the lawful apprehension and detention of him the said T. R. *for a certain offence, to wit, for a larciny*, before then committed by him the said T. R. at the township aforesaid, in the county aforesaid, for which said last mentioned offence, he the said T. R. was then and there liable by law to be apprehended, imprisoned, and detained, against the form of the stat. &c. and against the peace, &c.

(*Third count.*) And the jurors, &c. that the said T. R. heretofore, to wit, on the day and year aforesaid, with force and arms, at the township aforesaid, in the county aforesaid, in and upon the said C. S. feloniously, wilfully, maliciously, and unlawfully, did make an assault, and with a *certain sharp instrument* then and there feloniously, wilfully, maliciously, and unlawfully, did strike and cut the said C. S. in and upon the left hand of him the said C. S. with intent in so doing, wilfully, maliciously, feloniously, and unlawfully, to obstruct, resist, and prevent the lawful apprehension and detention of him the said T. R. *for a certain offence* before then committed by the said T. R. to wit, at the township aforesaid, in the county aforesaid, for the committing of which said last-mentioned offence, he the said T. R. was then and there liable by law to be apprehended, imprisoned, and detained, against the form of the statute, &c. and against the peace, &c.

(*Fourth count.*) In and upon the said C. S. then and

(*l*) These words are usually inserted, but are not contained in the purview of the act.

there being, feloniously, wilfully, maliciously, and unlawfully, did make an assault, and *with a certain sharp and cutting (m) instrument, to wit, a knife*, did then and there feloniously, wilfully, maliciously, and unlawfully, cut the said C. S. in and upon the left hand of him the said C. S. *with intent* in so doing, wilfully, maliciously, feloniously, and unlawfully, *to disable him the said C. S. to the great damage of him the said C. S. against the form of the stat. &c. and against the peace, &c.*

(*Fifth count.*) In and upon the said C. S. then and there being, feloniously, wilfully, maliciously, and unlawfully, did make an assault, and with a certain sharp and cutting instrument did then and there feloniously, wilfully, maliciously, and unlawfully, cut the said C. S. in and upon the left hand of him the said C. S. *with intent* in so doing, wilfully, maliciously, feloniously, and unlawfully, *to do some grievous bodily harm to him the said C. S. against the form of the statute, &c. and against the peace (n), &c.*

183. *For maliciously shooting at and cutting (o).*

That I. M. late of Manchester, in the county of Lancaster, labourer, H. M. late of the same place, labourer, and T. M. late of the same place, labourer, on, &c. with force and arms, at, &c. in and upon one J. M. feloniously, wilfully, maliciously, unlawfully, and of their malice aforethought did make an assault and *with a certain pistol, loaded with gunpowder and dicers, to wit, six leaden slugs*, then and there feloniously, wilfully, maliciously, and unlawfully, did shoot at the said J. M. then and there being a subject of our said lord the king, and in the peace of God and our said lord the king, then and there being, *and with divers sharp and offensive weapons, to wit, with a certain sword, and with a certain hedging hook*, him the said J. M. then and there being such subject as aforesaid, they the said I. M., H. M., and T. M. then and there feloniously, wilfully, maliciously, and unlawfully *did cut, with intent* in so doing, *that is to say, in so shooting at and cutting the said J. M. and by means*

(m) See the last note.

(o) Under the stat. 43 G. 3.

(n) *R. v. Robinson*, Ass.

c, 58. s. 1. see p. 580.

Lanc. 1812. the prisoner was convicted and executed.

thereof feloniously, wilfully, and of their malice aforethought, to *murder him the said J. M.* then and there being such subject as aforesaid, against the form, &c. and against the peace, &c.

(*Second count.*) That the said I. M. &c. on &c. with force and arms, at, &c. with a certain pistol loaded with gunpowder, and divers, to wit, six leaden slugs, feloniously, wilfully, maliciously, and unlawfully, did shoot at the said J. M. then and there being such subject as aforesaid, &c. (*as in the first count*) with intent, in so doing, that is to say, in so shooting at and cutting the said J. M. and by means thereof to *maim and disable* him the said J. M. then and there being such subject as aforesaid, against the form of the statute, &c. and against the peace, &c.

(*Third count.*) The like with intent in so doing, to wit, in so shooting at and cutting the said J. M. and by means thereof to *do some grievous bodily harm to him the said J. M.* then and there being such subject as aforesaid, against the form, &c.

(*Fourth count.*) And the jurors, &c. that the said I. M., H. M., and T. M. on said 18th day of April, in the 52nd year aforesaid, with force and arms, at, &c. *with a certain pistol loaded with gunpowder, and divers, to wit, six leaden slugs*, feloniously, wilfully, maliciously, and unlawfully, *did shoot* at the said J. M. then and there being such subject as aforesaid, and in the peace, &c. then and there being, with intent in so doing, and by means thereof then and there feloniously, wilfully, and of their malice aforethought, to *murder him the said J. M.* then and there being such subject as aforesaid, against the form of the statute, &c. and against the peace, &c.

(*Fifth count.*) The like with intent in so doing, and by means thereof, to *maim and disable* him the said J. M. then and there being such subject as aforesaid, against the form, &c.

(*Sixth count.*) The like with intent in so doing, and by means thereof to *do some grievous bodily harm to him the said J. M.* then and there being such subject as aforesaid, against the form, &c.

(*Seventh count.*) And the jurors, &c. that the said I. M., H. M., and T. M., on, &c. with force and arms, at, &c. *with divers sharp and offensive weapons, to wit, with a certain sword and a certain hedging hook*, feloniously, wilfully, maliciously, and unlawfully, *did cut* the said J. M.

then and there being such subject as aforesaid, and in the peace, &c. then and there being, with intent in so doing, and by means thereof, then and there *feloniously, wilfully, and of their malice aforethought, to murder* him the said J. M. then and there being such subject as aforesaid, against the form, &c.

(*Eighth count.*) The like, with intent in so doing and by means thereof, to *maim and disable* him the said J. M. then and there being such subject as aforesaid, against the form, &c.

(*Ninth count.*) The like, with intent in so doing and by means thereof, to *do some grievous bodily harm* to him the said J. M. then and there being such subject as aforesaid, against the form, &c.

(*Tenth count.*) And the jurors, &c. that the said I. M. &c. afterwards, to wit, on, &c. with force and arms, at, &c. with a certain pistol loaded with gunpowder, and divers, to wit, six leaden slugs, feloniously, wilfully, maliciously, and unlawfully, and knowingly, did shoot at the said J. M. *the said J. M. then and there being in his own dwelling-house*, situate and being at, &c. against the form of the statute, &c. and against the peace, &c.

(*Eleventh count.*) And the jurors, &c. that the said I. M. &c. afterwards, to wit, on, &c. with force and arms, at, &c. with a certain pistol loaded with gunpowder, and divers, to wit, six leaden slugs, feloniously, wilfully, maliciously, and unlawfully, did shoot at the said I. M. against the form, &c. (p).

184. *For administering drugs to a woman quick with child, with intent to procure abortion (q).*

That A. B. late of, &c. labourer, on, &c. and on divers other days and times between that day and the ——— day of ———, in the year aforesaid, with force and arms, at, &c. wilfully, maliciously, and feloniously did administer to, and cause to be administered to and taken by, one C. D. single woman, then and there being a subject of our said lord the king, and then and there being, and on the said other days and times aforesaid there continuing to be, quick with child*, divers large quantities, to wit, four

(p) *R. v. McGlead* and others, all convicted.

(q) Upon the same stat. see p. 550.

ounces weight of a noxious and destructive substance, to wit, *savin* (*r*), with intent thereby to cause and procure the miscarriage of the said C. D. against the form, &c. and against the peace, &c.

185. *The same, the woman not being quick with child.*

Wilfully, maliciously, and feloniously did administer to, and cause to be administered to and taken by C. D. single woman, then and there being a subject of our said lord the king, and then and there being, and on the said other days and times aforesaid, there continuing to be with child, but not quick with child, divers, to wit, two ounces weight of a certain drug, to wit, *savin*, with intent thereby to cause and procure the miscarriage of the said C. D. against the form, &c. and against the peace, &c.

In a *second count* allege the *administration*, &c. to C. D. not being quick with child.

186. *Indictment of felony for destroying a turnpike-gate.*

A certain turnpike-gate there, set up and erected to prevent passengers from passing by without paying the toll, laid and directed to be paid, by an act of parliament made in the ——— year of the reign of ———, entitled, "An Act," &c. (*here set out the title of the act under which the toll is collected*), with force and arms, wilfully, maliciously, and feloniously did throw down, level, and destroy, against the form, &c. and against the peace, &c. (*s*).

(*r*) The name of the drug is not material, see 3 Camp. 75. *R. v. Goldsmith*, and *supra*, p. 91.

(*s*) By stat. 13 Geo. 3. c. 84. s. 42. it is enacted, that if any person or persons whatever shall, either by day or night, wilfully or maliciously pull down, pluck up, throw down, level, or otherwise destroy, any turnpike-gate, or turnpike-gates, or any post or posts, rail or rails, wall or walls, or any chain, bar, or other fence or fences belonging to any turn-

pike-gate, or any other chain, bar, or fence, of any kind whatsoever, set up or erected, or hereafter to be set up or erected, to prevent passengers from passing by without paying any toll, laid or directed to be paid, by any act or acts of parliament made for that purpose; or any house or houses erected, or to be erected, for the use of any such turnpike-gate or turnpike-gates; or any crane, machine, or engine made or erected, or to be made or erected, on any turnpike-road by an-

187. *Indictment for breaking into houses, shops, &c. with intent to destroy linen goods, woollen goods, frame-work (t), &c.*

(Commencement as in pr. 1.) The dwelling-house (or

thority of parliament, for weighing waggons, carts, or carriages; or shall forcibly rescue any person or persons, being lawfully in custody of any officer or other person for any of the offences before mentioned; that then, and in any of the said cases, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be transported to one of his majesty's plantations abroad for seven years, or shall be committed to prison for any time not exceeding three years, at the discretion of the judge or court before whom such offender shall be tried; and any indictment for such offences shall and may be inquired of, examined, tried, and determined in any adjacent county within that part of Great Britain called England, in such manner and form as if the facts had been therein committed.

(t) By stat. 4 G. 3. c. 37. s. 16. if any person shall, by day or by night, break into any house, shop, cellar, vault, or other place or building, or by force enter into any house, &c. with intent to steal, cut, or destroy any linen, yarn, or any linen cloth, or any manufacture of linen yarn belonging to any manufactory, or the looms, tools, or imple-

ments used therein, or shall wilfully or maliciously cut in pieces or destroy any such goods, either when exposed to bleach or dry, shall be guilty of felony without benefit of clergy.

By st. 22 G. 3. c. 40. s. 1. if any person shall, by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge or other woollen goods in the loom, or any tools employed in the making thereof; or shall wilfully and maliciously cut or destroy any such serges or woollen goods in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges or other woollen goods are hanged in order to dry; or shall wilfully and maliciously break or destroy any tools used in the making any such serges or other woollen goods, not having the consent of the owner so to do, every such offender, being thereof lawfully convicted, shall be guilty of felony, without benefit of clergy.

Sec. 2. enacts to the same effect as to silk goods, or tools used in the manufacturing thereof,

Sec. 3. enacts the like as to linen and cotton manufactures, &c.

shop &c. as the case may be,) of one C. D. there situate, then and there feloniously and by force did break and

Sec. 4. repeals the seventh clause of 12 Geo. 1. c. 34. which was similar to the 1st section above set forth, the legislature, deeming it expedient to include those several offences in one act.

The eighth clause of 12 G. 1. extends it to combers and frame-work knitters.

By 28 G. 3. c. 55. if any person shall, by day or by night, enter by force into any house, shop, or place, with an intent to cut or destroy any frame-work, knitted pieces, stockings, or other articles being in the frame, or upon any machine or engine thereto annexed, or therewith to be used or prepared for that purpose; or shall wilfully cut or destroy any frame-work, knitted pieces, stockings, or other articles in the frame, or upon the machine or engine, or prepared for that purpose, or shall wilfully break, destroy, or damage any frame, machine, engine, tool, instrument, or utensil, used in making such frame-work, knitted pieces, stockings, or other articles or goods in the hosiery or frame-work knitted manufactory, not having the consent of the owner so to do; or break or destroy any machinery contained in any mill used in preparing or spinning of wool or cotton for the use of the stocking frames, every offender thereof convicted, shall be

guilty of felony, and transported for not exceeding 14 years nor less than seven years.

The stat. 52 G. 3. c. 16. reciting that the stat. 28 G. 3. c. 55. had not proved effectual, *enacts*, that if any person or persons shall, by day or by night, enter by force into any house, shop, or place, with an intent to cut and destroy any frame-work, knitted pieces, stockings, or lace, or other articles or goods being in the frame, or upon any machine or engine thereto annexed, or therewith to be used or prepared for that purpose, or with an intent to break or destroy any frame, machine, engine, tool, instrument, or utensil used in and for the working and making of any such frame-work, knitted pieces, stockings, lace, or other articles or goods in the hosiery or frame-work knitted manufactory; or shall wilfully and maliciously, and without having the consent or authority of the owner, destroy or cut, with an intent to destroy or render useless, any frame-work, knitted pieces, stockings, lace, or other articles or goods being in the frame, or upon any machine or engine as aforesaid, or prepared for that purpose, or shall wilfully and maliciously, and without having the consent or authority of the owner, break, destroy, or damage, with an intent to destroy or render useless, any

enter, with intent, feloniously, wilfully, and maliciously to cut and destroy a large quantity of woollen serge, then and there being in a certain loom for the making thereof, (or to cut, destroy, and break divers, to wit, two looms then and there employed in the making of woollen goods, according to the fact, using the language of the particular statute proceeded on,) belonging to him the said C. D. in the said dwelling-house then and there being, against the form, &c. and against the peace, &c.

(2nd count, for an actual destruction, commencement as in *pr.* 7.) 50 yards of woollen serge of the value of ——. of the goods and chattels of the said C. D. in a certain loom used in the making of woollen serge, belonging to him the said C. D. in the said dwelling-house of him the said C. D. then and there being, feloniously, wilfully, and maliciously, and without the consent of the said C. D. the owner thereof, did cut and destroy, against the form, &c. and against the peace, &c.

188. *For sending a letter threatening to charge a capital felony (u).*

(Commencement as in *pr.* 1.) Knowingly, unlawfully, and feloniously did send to one J. W. a certain letter with the

frame, machine, engine, tool, instrument, or utensil used in and for the working and making of any such frame-work, knitted pieces, stockings, lace, or other articles or goods in the hosiery or frame-work, knitted stocking, or frame-work lace manufactory, or shall wilfully and maliciously, and without having the consent or authority of the owner, break or destroy any machinery contained in any mill or mills used, or any way employed in preparing or spinning of wool or cotton, or other materials, for the use of the stocking or lace manufac-

tory, every offender being thereof lawfully convicted, shall be adjudged guilty of felony, and (by the st. 54 G. 3. c. 42. which repeals the former act) shall be transported for life, or for such term of years not less than seven years, as the judge before whom such offender shall be tried, shall, in his discretion adjudge and direct,

(u) By stat. 30 G. 2. c. 24.* s. 1. all persons who shall, after the 29th of September, 1767, knowingly send or deliver any letter or writing, with or without a name or names

* This statute does not operate to the repeal of the stat. 9 G. 1. c. 22. for they are consistent with each other, the former applying to those cases only where an actual demand is made, the latter to those cases where no demand is made. *R. v. Robinson, Leach, 592.*

name of him the said A. B. subscribed thereto, directed to Mr. J. W., threatening to accuse the said J. W. of having maliciously hired and procured a man wilfully to burn the dwelling-house of him the said A. B. being a crime punishable by law with death, with the view and intent to extort and gain money from the said J. W. being the person so threatened to be accused, and which said letter is of the tenor following, that is to say,

“Salford, August 29, 1803.

“Sir—The purport of this letter is to inform you, that last Saturday evening I was informed that you and J. M. hired a man to set the house on fire where I lived, in Church-street, which was done by your and J. M.’s order; now, sir, if you and J. M. do not come and give me ample satisfaction, your malicious actions shall be made known to the whole town. A. B.”

against the form of the statute, &c. and against the peace, &c.

(Second count charges the defendant with sending a letter, threatening to accuse the said J. W. of having hired a man to set fire to the house of him the said A. B. being a crime punishable by law with pillory.)

189. *For sending a threatening letter with a fictitious name subscribed thereto, demanding (x), &c.*

(Commencement as in pr. 1.) Knowingly, unlawfully,

subscribed thereto, or signed with a fictitious name or names,* letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandizes from the person or persons so threatened to be accused, shall be deemed offenders against the law and the public peace; and the court before whom such offender or offenders shall be tried, shall, in case he, she, or

they be convicted of any of the said offences, order such offender or offenders to be fined and imprisoned, or to be put in the pillory or publicly whipped, or to be transported as soon as they conveniently may be, (according to the laws made for the transportation of felons,) to some of his majesty’s colonies or plantations in America, for the term of seven years, as the court shall think fit to order.

(x) Upon the stat. 9 G. 1. c. 22. see note, p. 463.

The stat. 27 G. 2. c. 15. ex-

* Note the st. 9 G. 1. c. 22. is “without any name, or a fictitious one.”

and feloniously did send a certain letter in writing, signed with a fictitious name, (or without any name subscribed thereto, *according to the fact*,) that is to say, with the name of P. C. directed to D. H., I. M., and B. T., by the names and descriptions of Messrs. H., M., and T. London, *demanding (y) money (z)*, and which said letter is of the tenor following (a), that is to say,

“Manchester, March 31, 1812.

“Mr. H. if you are not acquainted of your partner's, I. M.'s transactions in Manchester, I will inform you; upwards of nine years since, he wanted to get J. M., a school-master out of his house, that he might build his warehouse, which has lately been burnt, but could not remove him as soon as he wanted; the following plan he pursued: about 11 years since, my brother left Ireland and came to England, got into bad company, spent all his money, he and his companions took bad ways; my brother, wanting money, was prevailed on to set J. M.'s

tending the stat. 9 G. 1. c. 22. enacts, that if any person or persons shall knowingly *send** any letter without any name subscribed thereto†, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of the king's subject or subjects, or to burn their houses, out-houses, barns, stacks of corn and grain, hay or straw, though no money or venison nor other valuable thing shall be demanded in or by such letter or letters, or shall forcibly rescue any person being lawfully in custody of any officer or other person for the said offence, every person so offending, being thereof lawfully convicted, shall be ad-

judged guilty of felony, without benefit of clergy.

(y) A request under a threat of libelling the prosecutor by charging him with murder, is within the words of the stat. 9 G. 1. c. 22.

(z) The words of the stat. are, “*money, venison, or other valuable thing.*” A bank note is within the latter words, (although it was not the object of larceny when the stat. was made,) both because it is sufficient if the thing be valuable *at the time of the demand*, and also because it was a *valuable* when the statute was made. Leach. 891.

(a) The letter must be set out, see p. 154.

* Neither the *writing* nor the carrying of a threatening letter is within the statute. Hammond's case, Leach 499. Robinson's case, Leach, 869.

† A letter to which initials are subscribed is within the statute. Leach, 889.

house on fire, which he did, for the reward of 20 guineas; about nine years since, my brother came home, and soon after fell ill, he desired we would send for our priest and another person, to take down, in writing, his confession; he then, in the presence of my father, myself, and brothers, confessed that he was hired to set the place on fire, the day before he tore the lock off the school-door, but was surprised when he came in the night to find the door fast,—but he got an iron crow and forced the door open,—he then went in, pulled the door after him, and then completed his infernal work; that being done, the next thing was to transport my brother to Ireland, accordingly a person was appointed, he went with him to Liverpool, and then saw him set sail for Ireland in the packet; my brother, after this confession, received the eucharist, and in less than 48 hours died; this, sir, is his confession on oath, and after his death we have all bound ourselves to be revenged, and have sought, and have completed our revenge, as you now find, by the same place in a heap of rubbish; after this was completed, I went back to Ireland, to acquaint my father and brothers what was done; we have again, a second time, mutually sworn to each other never to cease until you have made J. M.'s loss good in a double fold; if you choose to do this immediately we will forbear, if not, evil will be always at your peace.

P. C."

against the form of the statute, &c. and against the peace, &c.

Second count describing the letter as demanding a certain valuable thing, that is to say, double the loss sustained by the said J. M. by a fire in the same letter mentioned and referred to, and which said last-mentioned letter is of the tenor following, that is to say.

Third count—double the loss by the same letter pretended to have been sustained, &c.

OFFENCES RELATING TO OFFICE.

190. *Information against a MAGISTRATE (y) for discharging a person out of custody, who had been committed for seducing manufacturers into foreign service.*

(Commencement as in *pr.* 9.) That on, &c. at, &c. E. F. esquire, then and still being one of the justices (z)* of our said lord the king, assigned to keep the peace of our said lord the king, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors, within the said county committed,† did make his warrant in writing, under his hand and seal, bearing date the day and year aforesaid, directed to the keeper of, &c. (*as in the warrant,*) reciting, that M. W. had been brought before him the said A. B. by W. P. headborough, and charged upon the oath of I. D. with seducing L. M., N. O., &c. natives of this kingdom, and manufacturers in glass, to go into foreign service, wherefore he the said A. B. esquire, being such justice, did charge and order the said keeper of, &c. to receive him the said M. W. into the custody of him the said keeper of, &c. then sent to him the said keeper, together with the said warrant, for want of sureties, and him the said M. W. safely to keep in his custody, until he the said M. W. should be discharged by due course of law, which said warrant, afterwards, to wit, on the day

(y) No information will be granted by the court against magistrates for a mere error in judgment, *R. v. Cox*, 2 Burr. 785. *R. v. Bulmer and Baines*, 2 Burr. 1162.; but if it appear that the magistrates have been partially, maliciously, or corruptly influenced in the exercise of their discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by in-

dictment, information, or even possibly by action, if the malice be very gross and injurious. *R. v. Young and Pitts*, 1 Burr. 556. *R. v. Holland and another*, 1 T. R. 692. *R. v. Filewood and another*, East, 26 G. 3.

(z) It is sufficient, in an indictment against any officer, to aver that being such, &c. did the act, see p. 163. *R. v. Holland*, 5 T. R. 623.

and year aforesaid, at, &c. was delivered to the said keeper of, &c. in due form of law to be executed, together with the said M. W. by virtue of which said warrant the said keeper of, &c. kept and detained the said M. W. in his custody, in the said gaol, for the cause in the said warrant above specified, and the said — further giveth the court here to understand and be informed, that whilst the said M. W. was kept in the said gaol, in the custody aforesaid, for the cause aforesaid, to wit, on, &c. at, &c. one A. B. late of, &c. esquire, then and still being one of the justices, &c. well knowing the premises, but devising designing, contriving, and intending to pervert the course of justice, and to acquire private lucre and gain, did, on, &c. with force and arms, at, &c. under colour of divers false pretences and informations, unlawfully, wilfully, and corruptly, procure the said M. W. to be discharged, and to escape and go at large from and out of the custody of the said keeper of, &c. in which he the said M. W. was so confined as aforesaid, for the cause aforesaid, without taking sufficient sureties for the personal appearance of the said M. W. at the then next general gaol delivery to be holden for the said county, to answer the aforesaid complaint against the said M. W. and by then and there knowingly taking insufficient sureties for the personal appearance of the said M. W. at the then next general goal delivery to be holden for the said county, and also without any notice being first given to the prosecutor of the said M. W. or to E. F. esquire, who had so committed the said M. W. as aforesaid, for the cause aforesaid, of the intention of any person to become sureties for the personal appearance of the said M. W. as aforesaid, by then and there, to wit, on, &c. at, &c. making a certain warrant in writing, under the hand and seal of him the said A. B. then being such justice as aforesaid, bearing date, &c. directed to the keeper of, &c. by which said last-mentioned warrant, he the said A. B. did require the said keeper of, &c. to discharge out of custody the body of the said M. W. if detained for no other cause than what is expressed in the warrant of commitment of E. F. esquire, meaning the aforesaid warrant of E. F. esquire, dated the — day of — then last, on the oath of I. D. &c. (as in the former warrant, and also in and by the said last mentioned warrant of him the said A. B. falsely alleging that he the said A. B.

had taken sufficient sureties for the personal appearance of him the said M. W. at the then next general goal delivery to be holden for the said county, at, &c. whereas, in truth and in fact, the said A. B. did not take sufficient sureties for the personal appearance of him the said M. W. at the then next general gaol delivery for the said county, at, &c. by means whereof, he the said M. W. afterwards, to wit, on, &c. at, &c. was discharged from the said gaol, and then and there did escape and go at large, and also by means whereof, he the said M. W. did not appear at the then next general gaol delivery for the said county, to answer certain indictments, then and there, to wit, on, &c. at, &c. at the said then next general gaol delivery of the said county, preferred against him for the matters of complaint in the said warrant of commitment specified, nor hath since appeared to be dealt with according to law, to the great hindrance of public justice, in contempt of our said lord the king and his laws, and against the peace, &c.

Second count, stating generally that M. W. was duly committed to, &c. for want of sureties, being charged upon oath with, &c. (as before, and then proceed as in the last count.)

191. *Indictment against a magistrate for maliciously and corruptly refusing to license a public house (a).*

That A. B. late of, &c. esquire, on the ——— day of September, &c. and long before was and continually from thence hitherto hath been, and still is, one of the justices of our said lord the king, assigned to keep the peace in and for the said county, and also to hear and determine

(a) See *R. v. Young and Pitts*, 1 Burr. 556. where the court of K. B. held that they had no power or claim to review the reasons of justices of the peace, on which they form their judgments in granting licenses by way of appeal from their judgments, or over-

ruling the discretion in that behalf entrusted to them; but that if it clearly appeared that the justices had been partially, maliciously or corruptly influenced in the exercise of their discretion, they are liable to prosecution by indictment or information.

divers felonies, trespasses, and other misdemeanors committed in the said county,‡ acting in a certain division in the said county of M. commonly called the U. division, in which said division the parish of H. in the said county of M. then was and now is situate. And the jurors aforesaid, upon their oath aforesaid, do further present,** that on the said _____ day of _____, in the year aforesaid, at U. in the said county, a general meeting of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the said county in which the parish of H. then lay and now lies and was and is situate as aforesaid, was duly held for the purpose of licensing persons to keep common inns and alehouses within the said division, according to the form of the statute in such case made and provided, by and before the said A. B. as such justice as aforesaid, and certain other persons, to wit, I. F., I. B., and E. H. esquires then and there also being justices assigned to keep the peace of our said lord the king, in and for the said county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the said county, and acting in and for the said division. And the jurors aforesaid, upon their oath aforesaid, do further present, that one B. H. being a person of good fame and of sober life and conversation, and being then and there desirous of keeping a common inn or alehouse, in a certain house situate and being in the parish of H. in the said county of M. and within the division aforesaid, commonly called or known by the name or sign of the _____, in which said house the trade and business of a victualler was then carried on, under and by virtue of a certain license before then for that purpose duly granted unto one J. M. then lately deceased, he the said B. H. did then and there, at the said general meeting, apply to the said justices to grant to him the said B. H. a license to keep a common inn or alehouse in the said house so called and known by the name or sign of the _____, as aforesaid, for the space of one year, to commence on the 29th day of the same September, in the year aforesaid and did then and there, at the said general meeting, produce to and before the said justices so then and there met

for the purpose of granting such licenses as aforesaid, a certificate under the hands of the then churchwardens and overseers of the poor and of the then respectable and substantial householders and inhabitants of the said parish of H. in which the said house for which such license was applied for by the said B. H. as aforesaid, was and is situate as aforesaid, of his the said B. H.'s being a person of good fame and of sober life and conversation, and the said B. H. was then and there ready to enter into a recognizance with sufficient sureties for the maintenance of good order and rule within the same house, pursuant to the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. so being such justice as aforesaid, and acting as aforesaid, not regarding his duty as such justice, but wrongfully, maliciously, and corruptly intending to oppress, injure, hurt, and aggrieve the said B. H. by colour of his said office of a justice of the peace as aforesaid, did then and there, at the said meeting so held as aforesaid, on the said 17th day of September, in the 32nd year aforesaid, at U. aforesaid, in the said county of M. corruptly, maliciously, and unjustly, and without any lawful or reasonable cause whatever, and from motives of private partiality and favour unto and towards one R. S. the then keeper of a certain alehouse, situate in the division aforesaid, that is to say, a certain tavern or ale and victualling-house, then kept by the said R. S. situate in the parish of H. in the said county of M. in the said division, commonly called or known by the name or sign of the ———, refuse to grant to the said B. H. the said license, so by him applied for, as aforesaid, and did then and there, corruptly, maliciously, and unjustly, prevent and hinder such license from being granted to the said B. H. to the great damage of the said B. H. in breach and violation of the duty of the said A. B. as such justice as aforesaid, and against the peace, &c.

*Second count, similar to the first, after the***

Third count, stating an application by B. H. for a license to keep "a common inn or ale-house, in a certain house situate and being in the parish of H. in the said county, and within the division aforesaid, for the space

of," &c. and that he produced "the certificate, by law required of him the said B. H. being a person of good fame, &c. and was then and there ready to enter into a recognizance, with sufficient surety, according to the form of the statute, &c."

192. *Information against a justice of the peace for causing a person to be imprisoned for want of bail in a matter not cognizable before him, and ordering him to be kept in close confinement, without pen, ink, or paper, or the sight of any friend.*

(*Comm. as in pr. 9.*) That one A. B. esquire, on, &c. at, &c. and long before was, and from thence hitherto hath been, and still is, one of the justices, &c. (*as in pr. 190 from * to ‡.*) And that on the said ——— day of ———, in the ——— year aforesaid, one C. D. of R. in the said county, innholder, was apprehended and taken into custody by one E. F. who then, and for a long time both before and afterwards, was one of the constables of R. aforesaid,) and by the said E. F. carried and conveyed in custody before the said A. B. being such justice as aforesaid, at his then dwelling house, situate and being at L. in the said county of S. and there, to wit, at L. aforesaid, examined by the said A. B. so being such justice as aforesaid, touching and concerning a certain misdemeanor supposed to have been then lately committed and done by the said C. D. (in vilifying the character and hurting the trade of one G. H. of L. aforesaid, miller); and that the said C. D. was then and there charged and accused before the said A. B. being such justice as aforesaid, with having committed the said supposed offence: and the said attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed. That the said A. B. being such justice as aforesaid, wrongfully, unjustly, wickedly, and maliciously contriving and intending to hurt, injure, oppress, aggrieve, and prejudice the said C. D. in this respect, and to put him to great charges and expenses of his money, and to cause him to undergo and suffer great pain, torture, and anguish of body and mind, and wholly to ruin him, on the said ——— day of ———, in the ——— year aforesaid, after the said

examination of the said C. D. of, upon, and concerning the premises aforesaid, ordered and directed, that the said C. D. should find sureties for his personal appearance at the then next general quarter-session of the peace of our said lord the king, to be held in and for the said county of S. to answer the said charge; and because he the said C. D. did not, nor could conveniently, find such sureties as aforesaid, he the said A. B. so being such justice as aforesaid, further, wrongfully, unjustly, wickedly, and maliciously contriving and intending to hurt, injure, oppress, aggrieve, and prejudice the said C. D. as aforesaid, then and there, to wit, on the said ——— day of ———, in the ——— year aforesaid, at L. aforesaid, in the said county of S. wrongfully, unjustly, and maliciously, against the will of the said C. D. and contrary to the laws of this realm, (by virtue and colour of a certain warrant of commitment for that purpose made, under the hand and seal of him the said A. B. being such justice as aforesaid,) committed the said C. D. a prisoner to a certain prison, called the house of correction, situate at L. aforesaid, in the county aforesaid, to be there safely kept until he the said C. D. should find such sureties as aforesaid, and until he should be further examined concerning the premises; and then and there ordered, directed, and commanded the then keeper of the said prison to keep the said C. D. under close confinement in the said prison, and to deny him the use of pen, ink, and paper, and to let no letter be delivered to or from the said C. D. in any manner whatsoever, and also to let nobody see him or speak to him: and the said attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed, That the said A. B. being such justice as aforesaid, by virtue and under colour of the said warrant, order, and direction, did, on the said ——— day of ———, in the ——— year aforesaid, and for a long time, to wit, for the space of four days, then next following, at L. aforesaid, wrongfully, wickedly, maliciously, and unjustly cause and procure the said C. D. to be closely confined and imprisoned in the said prison, and to be debarred, denied, and restrained from the use of pen, ink, and paper, and from the free access of his relations and friends to him in the said prison, to wit, at L. aforesaid, in the county aforesaid, whereby the said C. D. during all that time, underwent and suf-

ferred great pain, torture, hardship, and anguish, both of body and mind, and was deprived of his liberty and prevented and hindered from finding such sureties as aforesaid, and was put to great charges and expenses in and about the obtaining his release and discharge from such commitment and imprisonment,* contrary to the laws and customs of this realm, in violation of the liberties, rights, and franchises of the subjects thereof, and against the peace of our lord the now king, his crown and dignity.

193. *Information against a justice of the peace, for causing a young woman to be publicly whipt as a disorderly person, without any view, information, or proof exhibited against her.*

(*As in pr. 191 to the†.*) And that he the said A. B. being such justice as aforesaid, and being a person of a wicked and malicious mind and disposition, and having no regard to justice, nor to the duty of his said office as such justice of the peace, but unlawfully, wickedly, and maliciously devising and intending to discredit, disgrace, aggrieve, and oppress one M. M. of the parish of C. in the said county of S. single woman, and to expose the said M. M. to ignominy, shame, scandal, and disgrace, did, on the said ——— day of ———, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unjustly, unlawfully, wickedly, and maliciously, and without any reasonable or probable cause whatsoever, under mere colour and pretence of his said office as such justice as aforesaid, cause and procure the said M. M. (being a young woman about the age of fifteen years, and being a person of good name, fame, credit, and reputation, and in the peace of God and our said lord the king,) to be taken into custody, imprisoned, and stripped quite naked down to her waist, and to be unlawfully, publickly, cruelly, and severely whipped and lashed upon her naked back with divers whips and cords by one J. R. then being the common beadle of the parish aforesaid, at a certain common whipping post, then erected and being in the common market place of the town of B. in the parish and county aforesaid, in the presence and view of a great number of people then and

there assembled and gathered together as a loose, idle, and disorderly person, (the said ——— day of ——— in the year aforesaid, being a public market day in the said town of B.); by means of which said whipping and lashing, the back and shoulders of the said M. M. were greatly cut, bruised, and wounded, and the said M. M. by means of the premises became sick, weak, and dis-tempered, and lost a great quantity of blood, which issued and flowed from the said cuts and wounds; whereas, in truth and in fact, neither the said A. B. nor any other justice of the peace of our said lord the king, in and for the said county of S. or elsewhere, had then and there any knowledge by his or their own view, or had then and there received or taken any information, examination, or other evidence upon oath whatsoever, that the said M. M. was, or had been, a loose, idle, or disorderly person; and whereas in truth and fact, the said M. M. never was a loose, idle, or disorderly person; to the great damage, scandal, and discredit of the said M. M. (*Conclusion as in the last pr. from the*.*) (2nd count.) And the said attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed, that the said A. B. being such justice as aforesaid, unlawfully, wickedly, and maliciously devising and intending to injure and prejudice the said M. M. as aforesaid, afterwards, to wit, on the said ——— day of ———, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously, and without any reasonable or lawful cause whatsoever, in and upon the said M. M. did make an assault, and her the said M. M. then and there unlawfully (and without any view by him the said A. B. or any other justice assigned to keep the peace of our said lord the king in this realm, had, or any legal information exhibited or made to him the said A. B. by any person whatsoever, of any offence having been committed by the said M. M.) did beat, bruise, wound, whip, and ill-treat, so that her life was greatly despaired of. (*Conclusion as in pr. 37.*) (3rd count, alleging an assault by A. B. being such justice. 4th count, for a common assault, as in pr. 38.)

194. *Indictment for refusing to watch with the constable when duly summoned.*

That A. B. late of, &c. yeoman, on &c. and long before, was an inhabitant in the parish aforesaid, in the county aforesaid, and that the said A. B. then and there was duly summoned and required to watch in the night of the same day with C. D. then being one of the constables of the same parish, in the county aforesaid: nevertheless, the said A. B. wholly neglecting his duty in that behalf, then, to wit, in the night of the same day, or in any part of the same night, did not watch with the said constable, in the parish aforesaid, in the county aforesaid, but to do his duty in that behalf then and there totally did neglect, and wilfully, obstinately, and contemptuously, then and there did make default, in contempt of our said lord the king and his laws, and against the peace, &c.

195. *Indictment for a contempt by the headborough in refusing to convey a person to prison, upon a commitment by a justice of peace.*

That on, &c. at the parish of, &c. one E. F. was brought by one A. B. then being one of the headboroughs of the same parish, before G. H. esq. then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county; and that the said E. F. then and there was charged, upon the oath of one I. K. before the said justice, with having violently assaulted her, in breach of the peace; and that the said E. F. was then and there examined before the said G. H. the justice aforesaid, concerning the said offence, so as above charged upon him; upon which, and for that the said E. F. could not then find sureties before the same justice for his personal appearance at the then next general quarter session of the peace, to be holden for the county aforesaid, to answer of and concerning the premises, he the said G. H. being such justice as aforesaid,

at the parish aforesaid, in the county aforesaid, in due form of law, did make a certain warrant under his hand and seal, bearing date on the said ——— day of ———, in the year aforesaid, directed, &c. (*the terms of the warrant should be accurately set out,*) to the keeper of ———, (the same being a certain gaol and prison of our said lord the king,) situate and being at, &c. commanding the said keeper that he should receive into his custody the body of the said E. F. charged upon the oath of the said I. K. with the premises above specified, and for want of sureties; and the said justice, by his warrant aforesaid, did command the said keeper the said E. F. safely to keep, until he the said E. F. by due course of law from thence should be discharged; which same warrant afterwards, to wit, on the said ——— day of ———, in the ——— year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to the said A. B. then being one of the headboroughs of the same parish, and then and there having the said E. F. in his custody, for the aforesaid cause; and the said A. B. then and there was required and commanded by the said G. H. the aforesaid justice, immediately to convey the said E. F. to the said prison, and to deliver the said E. F. to the keeper thereof, together with the aforesaid warrant. And the jurors aforesaid, upon their oath aforesaid, do further present, That the said A. B. late of the parish aforesaid, in the county aforesaid, yeoman, afterwards, to wit, on the said ——— day of ———, in the year aforesaid, then as aforesaid being one of the headboroughs of the same parish, and then having the said E. F. in his custody for the cause aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and contemptuously did neglect and refuse to convey the said E. F. to the said ———, being such gaol and prison as aforesaid, together with the said warrant, as he the said A. B. by virtue of his said office, according to law, should and ought to have done,* to the great hinderance of justice, and against the peace, &c.

196. *Indictment for a contempt by a high constable, in disobeying an order of sessions.*

That at the general quarter session of the peace of our

lord the king, holden at C. in and for the county of D. to wit, on, &c. before L, M, N, &c. esquires, and others their fellows,* justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county,** it was ordered. by the same justices and court there, as followeth, to wit, it is ordered by this court, “that, (*set out the order accurately,*) as by the said order of court more fully appears; of which said order the said A. B. the high constable (*or one of the high constables, according to the fact,*) in the aforesaid order named, afterwards, to wit, on, &c. at, &c. had notice (a): nevertheless, the said A. B. late of, &c. gent. on the said — day of —, in the year aforesaid, (then being high constable of —, as in the said order above mentioned,) on, &c. at, &c. unlawfully and contemptuously did neglect and refuse to, (*negating the performance of the order,*) as by the said order he the said A. B. was required to do, in contempt, &c. to the great hinderance and obstruction of justice, and against the peace, &c.

197. *Indictment against a constable for not appointing any watch, and absenting himself from watching.*

That A. B. late of, &c. on, &c. yeoman, and long before, was, and still is, one of the constables (b) of the parish aforesaid, in the county aforesaid; and that the aforesaid A. B. by reason of his office aforesaid, ought to appoint sufficient watch to be kept through the whole night by men, being inhabitants of the same parish, in convenient places within the parish aforesaid, for the preservation of the peace of our said lord the king, and for the apprehending of malefactors and suspicious persons: nevertheless, the said A. B. so being such constable, and neglecting his duty in this behalf, in the night of the aforesaid — day of —, in the year aforesaid, or in any part of the said night, at the parish aforesaid, in the county aforesaid, did not appoint any watch to be kept by men, being inhabitants of the same parish, within the parish aforesaid: but then and there, the whole night

(a) See p. 153.

(b) See p. 152.

aforesaid, from his said office voluntarily and obstinately did absent himself, and contemptuously did make default therein, in contempt of our said lord the king and his laws, and against the peace, &c.

198. *Indictment against a constable for refusing to assist another in securing a person in custody for a breach of the peace, in contempt of a justice's order.*

That on, &c. at, &c. divers disorderly persons, to the number of twenty and more, to the jurors aforesaid as yet unknown, then and there did unlawfully, riotously, and routously assemble and meet together to disturb the peace of our said lord the king; and being then and there so unlawfully, riotously, and routously assembled and met together, did commit divers outrages, to the great terror of all the liege subjects of our said lord the king, as well inhabiting and residing as passing and repassing there, and against the peace of our said lord the king, his crown and dignity; and that J. H. then being one of the constables of the said parish, did then and there apprehend and take, and cause to be apprehended and taken, the body of one D. S. late of U. in the county aforesaid, naylor, being one of the principal persons so as aforesaid unlawfully, riotously, and routously assembled and gathered together, to disturb the peace of our said lord the king as aforesaid, and the said D. S. in the custody of him the said J. H. for the cause aforesaid, then and there had; and that afterwards, to wit, on, &c. at, &c. he the said J. H. the constable aforesaid, by the order and direction of E. M. esquire, then and yet being one of the justices, (as in *pr.* 190 from * to *.*) did, in his proper person, apply to T. L. then of the said parish of A. in the county aforesaid, blacksmith, and then being (c) also one of the constables of the said parish, and by such order and direction he the said J. H. did, in his majesty's name, then and there charge and require the said T. L. forthwith to go along with him the said J. H. to aid and assist him in the preservation of the peace of our said lord the king, and for the better securing of the said D. S. so as aforesaid in custody for the cause aforesaid, in order to his being brought to justice, and dealt with according to law for the same;

(c) See p. 152.

yet the said T. L. so as aforesaid being one of the constables of the said parish as aforesaid, well knowing (d) the premises, but not regarding the duty of his said office, afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, obstinately, and contemptuously, did neglect and refuse to aid and assist the said J. H. for the purpose and on the occasion aforesaid, in the manner he the said T. L. was charged and requested to do as aforesaid, or in any other manner whatsoever, contrary to his duty in that behalf, (*conclusion as in pr.* 189.)

199. *Against a constable for neglecting to return his presentments at the assizes.*

That A. B. late of, &c. carpenter, on, &c. at, &c. and long before was constable of the township of R. aforesaid, yet the said A. B. not regarding the duty of his said office, on the same day and aforesaid, at S. in the said county of S. unlawfully and contemptuously did neglect and refuse to make and return to the Honorable H. B. esquire, one of the justices of our said lord the king of his Court of Common Pleas at Westminster, and W. N. esquire, one other of the justices of our said lord the king of the same court, and others their fellows, justices of our said lord the king of oyer and terminer. at the assizes and general session of oyer and terminer of our said lord the king, then and there holden before the said justices for the said county, (by virtue of his majesty's letters patent to them for that purpose directed,) an account in writing of what trespasses, nuisances, and other offences against the king's peace were committed, and of all other articles and things by him presentable as such constable as aforesaid, and which return he the said A. B. was, by virtue of his office aforesaid, and by the laws and customs of this realm, bound to have made to the said justices at the assizes and general session of oyer and terminer aforesaid. (*Conclusion as in pr.* 189.)

(d) See p. 152.

200. *Indictment against an overseer of the poor, for refusing to pay to a pauper a weekly sum of money, contrary to an order of two justices (e).*

West Riding of Yorkshire, to wit. That S. F. of the township of C. in the west riding of the county of York, spinster, before the making of the order of justices hereinafter mentioned, to wit, on, &c. at, &c. aforesaid, was delivered of a female bastard child, which said bastard child, at the time of the making of the order, and also at the time of the contempt and disobedience hereinafter mentioned, was, and yet is, living, to wit, at the township of C. aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. F. having such bastard child as aforesaid, she the said S. F. on the same day and year aforesaid, at C. aforesaid, became and was very poor and impotent, and not able to provide for herself and her said bastard child; and the said S. F. so being very poor and impotent, and not able to provide for herself and her said bastard child as aforesaid, she the said S. F. afterwards, to wit, on the same day and year aforesaid, at the township of C. aforesaid, applied to the then overseers of the poor of and for the township of C. aforesaid for relief in the premises; and that the then overseers of the said poor, and each and every one of them, then and afterwards, did wholly neglect and refuse to relieve the said S. F. so being very poor and impotent as aforesaid, to wit at the township of C. aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, That the said S. F. so being very poor and impotent, and unable to provide for herself and her said bastard child, after such neglect and refusal as aforesaid, to wit, on the same day and year aforesaid, at the township of C. aforesaid, appeared before H. W. clerk, and W. W. esquire, then being two of the justices of our said lord the king, assigned to keep his peace in and for the riding aforesaid, in the said county of York, and also to hear and determine divers felonies, trespasses, and other misdemeanors within the said riding, in the county aforesaid, committed: and then and there, before the said H. W. and W. W. being such justices as aforesaid, took

(e) *R. v. Fearnley*, 1 T. R. 316. See *R. v. Pierce*, 3 M. & S. 62. Append.

her corporal oath, and did depose, that she the said S. F. was very poor and impotent, and unable to maintain herself and her said child; and that she the said S. F. had then lately applied for relief to the then overseers of the poor of the said township, and was by them the said overseers refused to be relieved on that occasion. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said H. W. and W. W. being such justices as aforesaid, did thereupon afterwards, to wit, on the same day and year aforesaid, at the township of C. aforesaid, duly summon the said overseers to appear before them, the said H. W. and W. W. being such justices as aforesaid, and shew cause why relief should not be given to the said S. F. in the premises; and that the said then overseers, having been so summoned as aforesaid, did, before the said H. W. and W. W. being such justices as aforesaid, refuse to relieve the said S. F. on that occasion, and did not shew to the said justices any sufficient cause why relief should not be granted to the said S. F.; and that the said H. W. and W. W. being such justices as aforesaid, did thereupon, afterwards, to wit, on the same day and year aforesaid, at the township of C. aforesaid, make their certain order in writing, signed with the proper hands and sealed with the seals of them the said H. W. and W. W. so being such justices as aforesaid; whereby, after reciting that the said S. F. made oath unto them the said H. W. and W. W. two of his majesty's justices of the peace for the said riding, that she the said S. F. was very poor and impotent, and not able to provide for herself and her bastard child; and that she the said S. F. had then lately applied for relief to the overseers of the poor of the said township, and had been by them refused to be relieved; and after reciting also, that the overseers of the poor of the said township had been duly summoned to shew cause why relief should not be given to the said S. F. but had refused to relieve her with sufficient relief, and had not shewn any sufficient cause why relief should not be granted to her, they the said H. W. and W. W. did thereby "order the then churchwardens and overseers of the poor of the said township, or some or one of them, to pay unto the said S. F. the sum of one shilling and sixpence weekly, and every week, for and towards the support and maintenance

of her and her said bastard child, until such time as they should be otherwise ordered, according to law, to forbear the said allowance." And the jurors aforesaid, upon their oath aforesaid, do further present, That one J. F. late of the township of C. aforesaid, in the said west riding of Yorkshire, clothier, on, &c. and long before, and afterwards, was one of the overseers of the poor of and for the township of C. aforesaid, having duly accepted the said office, to wit, at the township of C. aforesaid; and that it was then and there the proper office and duty of the said J. F. as such overseer as aforesaid, well and faithfully to execute and obey the said order of the said H. W. and W. W. so made as aforesaid, according to the exigency thereof. And the jurors aforesaid, upon their oath aforesaid, do further present, That the said order of the said H. W. and W. W. so made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at the township of C. aforesaid, in the riding aforesaid, was duly shewn and delivered to the said J. F. so being such overseer as aforesaid, to be by him well and faithfully executed and obeyed in all things, according to the exigency thereof, and according to the said office and duty of the said J. F. as such overseer as aforesaid (f).^{*} And the jurors aforesaid, upon their oath aforesaid, do further present, That the said J. F. so being such overseer as aforesaid, and so having seen and received the said order as aforesaid, afterwards, to wit, on the said ——— day of ———, in the year aforesaid, and continually from thenceforth, for and during all such time as the said J. F. continued in the said office of overseer of the poor of the town of C. aforesaid, unlawfully, wilfully, obstinately, and contemptuously, did neglect and refuse

(f) It was objected, on demurrer, that a demand should have been alleged, but on this point the court gave no opinion. The objection would be obviated, by alleging at the *, that the said J. F. so being such overseer, as aforesaid, and so having received the said order as aforesaid, on the day and year aforesaid, and on divers other days and times, between that day and

the taking of the inquisition, and whilst he continued to be such overseer, was requested by the said S. F. to pay her the said sum of one shilling and sixpence, to wit, at, &c.

It was also objected, that the sum was not payable till the end of the week, but the court were of opinion, that it was payable at the beginning of the week. 1 T. R. 316....

and hath wholly hitherto neglected and refused to pay unto her the said S. F. the sum of one shilling and sixpence, or any part thereof, weekly, and every week, for and towards the support and maintenance of her the said S. F. and her said bastard child, as by the said order be the said J. F. as such overseer as aforesaid, was required to do; and the same, and every part thereof, is still wholly due and unpaid to the said S. F.; and although be the said J. F. hath not, at any time whatsoever, hitherto been otherwise ordered, according to law, to forbear the said allowance, contrary to the said office and duty of him the said J. F. to the damage of her the said S. F. and against the peace, &c.

201. *Against two collectors of taxes for EXTORTING (g) money under colour of their office.*

Borough of Leeds, in the county of York, to wit (h), That L. A. of Leeds, in the borough aforesaid, linen draper, and W. B. late of Leeds aforesaid, in the borough aforesaid, grocer, there being collectors of several sums assessed upon the inhabitants of a certain liberty, called Leeds upper division, within the borough aforesaid mentioned and expressed, in a certain assessment made and confirmed, in pursuance of a certain act of parliament made in the first year of the reign of our said lady, the now queen of England, &c. entitled, "An Act for grant-

(g) It is said that extortion, in a large sense, includes every oppression under colour of right; but that, in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 Haw. 170.

And it has been resolved, that a promise to pay them money for the doing of a thing which the law will not suffer them to take any thing for, is merely void. 1 Haw. 171.

And by the stat. 3 Edw. 1. c. 26. (which is only in affirmance of the common law,) no sheriff, nor other the king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure. See the stat. 3 R. 1. c. 27. s. 30. and 2 Ld. Ray. 1265. See the APPENDIX.

(h) *R. v. Atkinson and another*, 3 Ld. Raymond, 61.

ing an Aid to her Majesty by divers Subsidies and a Land-tax," the said I. A. and W. B. on, &c. in the borough aforesaid, by colour of the office aforesaid, unlawfully, extorsively, and deceitfully, and of their own wrong, exacted, received, and had, of one T. C. then of Leeds aforesaid, in the borough aforesaid, (being not assessed at all by virtue of the act of parliament aforesaid,) the sum of four shillings (i), and that the said I. A. and W. B. the same sum of four shillings, so as aforesaid, of the said T. C. unlawfully, extorsively, and deceitfully exacted, received, and had, and to the proper use of them the said I. A. and W. B. then and there unlawfully, injuriously, and deceitfully converted, to the great damage of him the said T. C. and against the peace, &c. (i).

202. *Indictment against a constable for extorting money of a person apprehended by him on a bench warrant, to let her go without carrying her before any justice of the peace.*

(k) That A. F. late of, &c. yeoman, on, &c. at, &c. then being one of the constables of the same parish, at the parish aforesaid, in the county aforesaid, did take and arrest one N. L. spinster, by colour of a certain warrant, commonly called a bench warrant, which he the said A. B. then and there had, to apprehend the said N. L. to answer to a certain trespass and assault, whereof the said N. then stood indicted, as the said A. B. then and there alleged and pretended, and the said A. B. her the said N. then and there had in his custody; and that the said A. B. afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, corruptly, deceitfully, and extorsively, for the sake of gain, and contrary to the duty of his office, did

(i) Qu. whether it would not be safer to aver, "under pretence that he the said T. C. had been assessed under the said act, and was then and there liable, by virtue of such assessment, to pay to them the said sum."

(k) An indictment for extortion may be laid in any county, 31 Eliz. c. 5. See 2 Ins. 210. Com. Dig. Ext. C. The indictment may be joint, Str. 73. Ld. Ray. 1248.

extort, receive, and take of and from the said N. the sum of five shillings, of lawful money of Great Britain, for discharging the said N. out of the custody of him the said A. B. without conveying her before any justice of the peace for the said county, to answer to the said trespass and assault, whereof she was supposed to stand indicted as aforesaid, to the great damage, &c. and against the peace, &c.

203. *Indictment against a tipstaff of the Court of King's Bench for extortion.*

That A. L. late of, &c. gentleman, on, &c. at, &c. unlawfully, unjustly, and extorsively, did exact and receive of and from one R. H. two pieces of gold coin, of the proper coin of this kingdom, called guineas, of the value of forty-two shillings, under colour and pretence of being tipstaff to the Right Honourable W. Earl of M. then chief justice of our said lord the king, assigned to hold pleas in the court of our lord the king, before the king himself, under colour and pretence of a fee due to him the said A. for not carrying the said R. H. to prison, after he had taken and arrested him the said R. H. by virtue of a warrant under the hand and seal of the said W. Earl of M. chief justice aforesaid, issued forth against the said R. H. to answer to an indictment before then found against the said R. H. at the general quarter session of the peace held for the county aforesaid, for an assault upon A. A. as the said A. L. then and there alleged to the said R. H. whereas in truth and in fact no such fee was then due to the said A. L. in that behalf, to the great damage of the said R. H. and against the peace, &c.

204. *Indictment against the servant of a clerk of a market for extortion.*

That E. R. late of, &c. yeoman, on, &c. at, &c. under colour of being servant and agent to T. R. and C. P. esquires, clerk of the market of the household of our said lord the king, unlawfully, unjustly, and extorsively, did demand, receive, and have, of one W. C. the sum of fourteen pence, of lawful money of Great Britain, for and

as a fee for examining, marking, and sealing of five quart pots made of pewter, seven pint pots made of pewter, and two half-pint pots made of pewter; whereas, in truth and in fact, there was then no such fee due to the said T. R. and C. P. the said clerk of the market of the household of our said lord the king, in that behalf, to the great damage and oppression of the said W. C. and against the peace, &c.

205. *Indictment against a coroner for extortion (l).*

That W. N. late of the parish of S. in the county of Gloucester, gent. (the said parish of S. being the usual

(l) By stat. 3 Edw. 1. c. 10. no coroner shall take any thing to do his office, upon pain of great forfeiture to the king.

But by stat. 3 H. 7. c. 1. upon an inquisition taken upon view of the body murdered, he shall have thirteen shillings and four-pence of the goods of the murderer, and if he hath nothing, of the amerciaments of the township for the escape of the murderer.

And by stat. 1 Hen. 8. c. 7. s. 1. the coroner shall have nothing where the inquisition is taken upon view of one slain by misadventure. Penalty forty shillings.

Justices of assize, and justices of the peace within the county where any such default of the coroner be, have power and authority to inquire thereof, and determine the same as well by examination as presentment. 1 Hen. 8. c. 7. s. 2.

But by stat. 25 Geo. 2. c. 29. s. 1. the fees are now settled, that the coroner be paid twenty shillings, and also nine-

pence for every mile he is obliged to travel from his usual place of abode, to be paid out of the county rates.

And by s. 4. of the same statute, it is enacted, that no coroner to whom any benefit is given by that act shall, by colour of his office, or upon any pretext whatsoever, take for his office doing, in case of the death of any person, any fee or reward, other than the said fee, of thirteen shillings and four-pence, limited as is aforesaid by the said act made in the third year of the reign of king Henry the Seventh, and other than the recompense limited and appointed by this statute, upon pain of being deemed guilty of extortion.

By s. 6. a coroner, convicted of extortion, or wilful neglect of his duty, or misdemeanor in office, may be removed from office by judgment of the court in which he is convicted, unless such office be annual, or annexed to some other office.

place of abode of him the said W. N.) on, &c. then being one of the coroners of our said lord the king for the county of Gloucester, at, &c. by colour of his said office, unlawfully and unjustly did demand, extort, receive, and take of and from one R. S. the sum of fifty shillings, of lawful money of Great Britain, for and as his fee for executing and doing of his office aforesaid, to wit, upon the view of the body of one J. C. late of Stow in the Wold, in the said county of Gloucester, glazier, who at the parish of S. aforesaid, in the county aforesaid, on the day and year above mentioned, was slain by misadventure, and there lay dead in contempt of our said lord the king and his laws, to the great damage of the said R. S. against the form of the statutes, &c. in such case made and provided, and against the peace, &c.

206. *Against a headborough for extortion.*

That A. B. late of, &c. yeoman, on, &c. with force and arms, at, &c. then being one of the headboroughs of the same parish, by colour of his said office, unlawfully, unjustly, and extorsively did exact, extort, receive, and have of and from one E. F. the sum of five shillings, of lawful money, as and for a pretended fee of him the said A. B. for taking and arresting the said E. F. by virtue of a warrant of B. H. esquire, (one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed in the same county), directed to, &c. (*as in the warrant,*) and for the obtaining and discharging of the same warrant, as the said A. B. did then allege; whereas, in truth and in fact, no fee whatever was then due to the said A. B. from the said E. F. in that behalf, to the great damage of the said E. F. and against the peace, &c.

207. *Against a gaoler for extortion in office (m).*

That A. B. late of, &c. and continually afterwards,

(m) *R. v. Broughton*, Trem. P. C. 111.

until the day of exhibiting this information (or until the day of the taking this inquisition *if by indictment*;) was and yet is keeper of the prison of our said lord the king, of ———, at, &c. in the county of ———, and the office of keeper of the said prison, at the parish aforesaid, in the county aforesaid, during the whole of the time aforesaid, took upon himself, exercised, and had, and still undertakes, exercises, and has; yet the said A. B. not regarding the duty of the said office, but abusing the trust in him reposed, and contriving and intending the liege subjects of our said lord the king, for his private gain, to oppress, impoverish, and greatly harrass, and the due execution of justice, as much as in him lay, to retard and obstruct, on, &c. (n) at, &c. under colour of his office, as keeper of the said gaol, unlawfully, unjustly, and extorsively, did exact, obtain, and have, and into his hands and custody receive from one E. O. the sum of 2s. 4d. for charging one A. H. esquire, then a prisoner in the said prison, and in the custody of him the said A. B. with an action for 200l. prosecuted at the suit of him the said E. O. (o); and that he the said A. B. on, &c. at, &c.* under colour of his office, as keeper of the said gaol, unlawfully, unjustly, and extorsively, did exact, receive, and have, and into his hands and possession obtain, from one H. M. two pieces of gold, commonly called guineas, each piece thereof being lawful money, &c. and of the value, &c.** for ease and favour to and for relieving and releasing one B. D. from his irons, he the said B. D. then and there being a prisoner in the said gaol, and in the custody of the said A. B. detained for a felony and murder before then by the said B. D. supposed to have been committed; and that the said A. B. on, &c. at, &c. (as before, from* to **,) for the discharging of the said P. P. from the said prison, out of the custody of the said A. B. although, in truth and in fact, no such sum was due to the said A. B. upon such discharge; and whereas also one J. T. and T. K. on, &c. at, &c. in the night of the said day, had

(n) In the original this and several other offences are laid to have been committed in the interval between the day first named and the day of exhibiting the information, but it is

more technical to allege a day certain.

(o) As to the necessity for alleging that nothing was due, see p. 152.

been taken and apprehended by one T. H. then constable of the said last-mentioned parish, then and there being upon his watch, as malefactors, night walkers, and suspicious persons, and by the said constable had been there taken and conveyed to the said prison, and committed and delivered into the custody of the said A. B. by him in the same prison to be safely kept, until the said persons so taken and committed, at a convenient time the next day, could be taken before some justice, assigned to keep the peace of our said lord the king, within the county aforesaid, to be examined and dealt with according to law; and that he the said A. B. then and there had and detained the said J. T. and T. K. in the said prison, in his custody, and then and there undertook to keep them in manner and for the end aforesaid, yet the said A. B. afterwards, and before the said J. T. and T. K. had been or could have been brought before any justice, to wit, on, &c. at, &c. voluntarily and unlawfully, and without any legal warrant or authority, discharged and dismissed the said J. T. and T. K. out of his custody, by means whereof the said malefactors escaped without punishment, contrary to his duty in the execution of the said office, to the great scandal, disgrace, and obstruction of justice, to the great damage, grievance, oppression, and ruin of many of the subjects of our said lord the king, and against the peace, &c.

208. *Order of sessions for the discharge of a clerk of the peace for extortion (p).*

Whereas, by a complaint and charge in writing at this sessions, held the said ——— day of ———, preferred and exhibited to this court against R. B. of Appleby, in the county of W. gentleman, clerk of the peace for the said county, who, the ——— day of ——— last past, and during the whole last general quarter sessions of the peace held for this county, did claim and exercise the said office of clerk of the peace for this county, the said R. B. was charged with divers misdemeanors, by him committed in the execution of the said office of clerk of the peace for this county, viz. that he the said

(p) See 1 Will. & M. sess. 1. c. 21. *R. v. Baines*, *Ld. Ray.* 1265.

R. B. the said — day of — last, did, *under colour of his said office, extorsively exact and receive* from one prisoner L. and compel him to pay to the said R. B. the sum of eight shillings and six-pence, for a subpoena to summon four witnesses to give evidence for him at the *general quarter sessions of the peace, to be holden on, &c. in and for the said county*, which subpoena contained but twelve lines, and for which no other or greater sum than — shillings was due to the said R. B.; and that the said R. B. also did, at the said general quarter sessions held for this county, *under colour of his said office, extorsively exact and receive* of one I. S. of Woodside, a poor labourer, and force him to pay to him the said R. B. the sum of nine shillings more than his just fees, for, &c.; and also, that the said R. B. had committed divers other exactions and extortions, particularly mentioned in the said charge in writing; and now at this general quarter sessions held by adjournment, on the said — day of —, upon due examination, in open court of the said matters alleged against the said R. B. who by order of this court hath been duly summoned to answer the same, and did attend in person, and had particular notice of each charge against him, and made defence by his counsel thereunto, and upon full proof of the premises made, in open court, it doth appear to this court that the said R. B. hath misdemeaned himself in his said office of clerk of the peace of this county, and in execution thereof, by exacting and extorting, by colour of his said office, from the said prisoner L. on the said — day of — last past, the sum of eight shillings and sixpence for the said subpoena to summon the said four witnesses, which is three shillings and sixpence more than the accustomed fee of right due for the same, and by exacting and extorting, by colour of his said office, at the last general quarter sessions, from the said I. S. nine shillings more than his just fees, and thereupon this court doth openly in court discharge and remove the said R. B. from the office of clerk of the peace of this county of W. and he is thereby, by this court, discharged from the same accordingly (q).

(q) The defendant objected to this order, after it had been removed into the Court of K. B., that the introductory part of the order was nothing more than an inference from the facts, and of itself was too general and uncertain to support the

209. *Indictment against a coroner for refusing to take an inquisition (r).*

That on, &c. at, &c. one C. D. at L. in the county of L. was drowned and suffocated in a certain pond, and of that drowning and suffocating she the said C. D. then and there instantly died; and that the body of the said C. D. at L. aforesaid, in the county aforesaid, lay dead, of which one A. B. late of G. in the county aforesaid, gentleman, afterwards, to wit, on the said ——— day of ——— in the year aforesaid, then being one of the coroners of our said lord the king for the county aforesaid, at G. aforesaid, had notice: nevertheless, the said A. B. not regarding the duty of his office in that behalf, afterwards, to wit, on, &c. at, &c. to execute his office of and concerning the premises, and to take inquisition of our said lord the king, according to the laws and customs of this realm, concerning the death of the said C. D. unlawfully, obstinately, and contemptuously, did neglect and refuse; and that the said A. B. no inquisition in that behalf hath as yet taken, against the peace, &c.

order; and that the statement of facts was insufficient, because those allegations were wanting, which have been above supplied in italics. C. J. Holt and Mr. J. Powell held, that the order was vicious; Powys and Gould, justices, that it was sufficient. The court, being thus divided, agreed, that the case should be argued before all the judges in England, and that judgment should be given according to the majority of opinions. In the result, four of the judges were of opinion, that the order was good, and eight were of opinion that it should be quashed, and it was quashed accordingly. *Ld. Ray.* 1265.

(r) By stat. 8 Hen. 1. c. 7. s. 2. justices of assize and of the peace within the county, have power and authority to inquire of and determine upon the defaults of coroners, by examination and presentment. See 25 Geo. 2. c. 29.

By stat. 3 Edw. 1. c. 9. coroners concealing felonies or not doing their duty, through favour to the misdoers, shall be imprisoned a year, and fined at the king's pleasure.

And by stat. 3 Hen. 7. c. 1. if any coroner be remiss, and make not inquisitions upon the view of the body dead, and certify the same to the goal-delivery, he shall forfeit to the king an hundred shillings.

210. *For refusing to take the office of overseer after a due election.*

That A. B. late of the parish of C. on, &c. and long before, was, and still is a substantial housekeeper, residing within the parish aforesaid, in the county aforesaid, and a proper and able person to serve the office of an overseer of the poor of the said parish; and that the said A. B. on, &c. at, &c. *by warrant under the hands and seals* of ———, clerk, and ———, clerk, two of the (s) justices of our said lord the king, assigned to keep his peace in and for the county of D. (one of them, to wit, the said ——— then being of the quorum,) was lawfully nominated and appointed one of the overseers of the poor of the said parish for one year (t) then next ensuing, or until another overseer should be appointed in his stead, whereof the said J. H. afterwards, to wit, on, &c. at, &c. had due notice; nevertheless the said J. H. not regarding his duty in that behalf, but contriving and intending, as much as in him lay, to render the said warrant of appointment of no effect, from the said ——— day of ——— in the year aforesaid, and continually afterwards, until the day of the taking of this inquisition, at, &c. unlawfully, wilfully, obstinately, and contemptuously did neglect and refuse to take upon himself and execute the said office of overseer of the poor of the said parish. (*Conclusion as in pr. 211.*)

211. *Indictment against a person for refusing to take the office of chief constable (u).*

(*Commencement as in pr. 196, to the **.*) One A. B. late

(s) In all indictments for refusing to take an office, it is essential to shew that the defendant was under a *legal obligation* to undertake it, by setting forth *how he was elected*. See p. 161, 2.

(t) By this the court will intend the overseer's year. See *R. v. Burder*, 4 T. R. 778.

(u) Every justice of the peace may cause two constables to be chosen in each hundred; and this seems to be meant of the high constables of hundreds, and to include the swearing of them. Dalt. c. 28.

The usual manner is, that these high constables of hundreds be chosen either at the

of the parish of _____, in the said county of _____, yeoman, then and long before being inhabitant and residing in the parish aforesaid, within the hundred of L. in the said county, and a proper person to execute the office of chief constable within the said hundred, at the same session by the justices above named, in due manner was elected to be one of the chief constables of the hundred aforesaid, in the room and stead of one M. N. whereof the said A. B. afterwards, to wit, on, &c. at, &c. had notice: nevertheless, the said A. B. not regarding his duty in that behalf, but contriving and intending, as much as in him lay, to prevent and hinder the due execution of justice, from the said _____ day of _____, in the year aforesaid, until the day of the taking of this inquisition, at the parish aforesaid, within the hundred aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously, did refuse to take upon himself and execute the said office of chief constable within the hundred aforesaid, contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our said lord the king, his crown and dignity.

212. *Indictment against a person for refusing to take the oath of constable of a manor, to which office he had been duly elected at a court-leet (x).*

That at a court-leet of _____, lord of the manor of B. in the county of W. held in and for the said manor of B. on, &c. before R. S. gentleman, then being steward of the said court of the said _____, lord of the said manor, J. D. late of the parish of D. within the manor aforesaid, in the county aforesaid, brazier, according to the custom of the said manor, was duly nominated and elected by J. R. &c. (*the names of the jurors*) the jury then and there duly sworn at the said court-leet, as well for our said lord the King as for the said lord of the said manor, according to

quarter sessions of the peace, or, if out of the sessions, then by the greater number of the justices of the peace of that division where they dwell: and likewise that they be sworn, ei-

ther at the sessions, or by warrant from the sessions; which course hath been allowed and commended by the judges of assize. Ibid.

(x) See p. 161.

the custom of the said manor, one of the constables of the said manor of B. for the year then next ensuing, (he the said J. D. then being an inhabitant and resiant of and within the said manor, and a fit person to be so nominated and elected, and a person liable to be nominated and elected to the said office;)* and that afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the manor and county aforesaid, the said J. D. had notice from the said R. S. so being steward as aforesaid, of such his nomination and election as aforesaid; and that afterwards, to wit, on, &c. at, &c. in the manor and county aforesaid, the said R. S. then being such steward as aforesaid, did certify under his hand and seal to G. P. esquire, then being one of the justices, (*as in pr. 196, from * to ***,) that the said J. D. had, according to the custom of the said manor, been appointed, at a court-leet held in and for the said manor of B. on the said ——— day of ———, in the year aforesaid, constable of the said manor of B. whereupon the said G. P. the justice aforesaid, afterwards, to wit, on, &c. at, &c. did make and issue a certain summons under his hand and seal, directed to the constable and headborough of B. aforesaid for that time being, thereby requiring them, and each of them, forthwith to summon the said J. D. to appear before him the said G. P. being such justice as aforesaid, at the house of J. C. in B. aforesaid, on, &c. by three of the clock in the afternoon of the same day, to take the oath of office of constable for the said manor of B. so being nominated and elected for and to that office as aforesaid. And the jurors aforesaid now here sworn, upon their oath aforesaid, do further present, That the said J. D. afterwards, to wit, on the said ——— day of ———, in the ——— year aforesaid, at the parish aforesaid, in the manor and county aforesaid, was duly summoned by R. B. then being constable of the manor of B. aforesaid, to appear before the said G. P. being such justice as aforesaid, at the house of the said J. C. in B. aforesaid, on, &c. by three of the clock in the afternoon of that day, to take the oath of office aforesaid, according to the tenor of the said summons; and that although the said J. D. personally appeared before the said G. P. on the day and at the place in that behalf aforesaid, according to the summons aforesaid, and was then and there required by the said G. P. to

take the said oath of office of constable of and for the said manor of B. according to the nomination and election aforesaid; yet the said J. D. then and there, to wit, on, *(state the refusal as in pr. 210.)* *(Second count, alleging the election, as before, to the *)*; and that afterwards, to wit, on the same day and year last aforesaid, at the parish aforesaid, in the manor and county aforesaid, the said J. D. then being personally present in the said last-mentioned court, was required by the said R. S. then being steward as aforesaid, then and there to be sworn into and take upon himself the said office of constable, in and for the said manor, according to such his nomination and election as last aforesaid; yet the said J. D. then and there *(neglect and refusal as before.)*

213. *Indictment against a person for refusing to take the oath of constable of the ward of Farringdon Within, after being elected at a court of wardmote (y.)*

That F. M. late of, &c. merchant, on, &c. and long before, and continually from thence until the day of the taking of this inquisition, was an inhabitant and resiant paying scot and bearing lot within the said parish of C. C. in the ward of Farringdon Within, in London aforesaid, and a fit and proper person to execute the office of constable within the said ward; and that within the same ward there is, and from time whereof the memory of man is not to the contrary hath been, a certain court of our lord the now king and his predecessors, kings and queens of England, called the wardmote, held and to be held in every year upon the feast-day of Saint Thomas the apostle, (unless the same feast should happen to be on a Sunday, and in such case then upon the day next following such Sunday,) before the alderman of the ward aforesaid for the time being, or his deputy, in which said court of wardmote, according to the custom within the said ward used and approved of, during the time last aforesaid, to wit, in the parish and ward aforesaid, all the men inhabiting and resiant, paying scot and bearing lot within the ward aforesaid, for the time being, have been used and accustomed, and ought and were bound, by reason

(y) See p. 161.

of their residence, to appear in the said court and do their suit there; and in the said court of wardmote, according to the custom of the said ward, the said men inhabiting and resiant, paying scot and bearing lot within the same ward for the time being, were, during the whole time aforesaid, used and accustomed, and ought, to appoint and choose yearly divers persons then inhabiting and resiant, and paying scot and bearing lot within the ward aforesaid, constables, to and for the said ward, for the preserving of the peace of our said lord the king and for the apprehending of rogues, vagabonds, and other suspicious persons within the ward aforesaid, for the public good; which said persons, so as aforesaid appointed and chosen, were used and accustomed, and ought, to hold the same office for the year then next ensuing, and until other persons should be elected into the said office; and also were used and accustomed, and ought, on the Monday next after the feast of the Epiphany next after their said election, to appear at the Guildhall of the said city of L. (2) * in the court then and there held before the mayor and aldermen of the same city for the time being, for all the time aforesaid, and take their corporal oaths before such mayor and aldermen for the due execution of the said office of constable. And the jurors aforesaid, upon their oath aforesaid, do further present, That, according to the custom of the ward aforesaid, a court of wardmote was holden for the said ward of Farringdon Within, to wit, in the said parish of C. C. in the said ward, on, &c. at, &c. before J. P. then being the lawful deputy of W. B. esquire, then and now being one of the aldermen of the said city, and then and yet alderman of the said ward; and that the said court of wardmote was in due manner continued, by several adjournments, until the ——— day of ———, in the ——— year aforesaid; and that at the same court of wardmote, being duly holden by adjournment on the said ——— day of ———, in the ——— year aforesaid, within the said parish of C. C. in London aforesaid, in the parish and ward aforesaid, before the said J. P. the deputy aforesaid, the said F. M. was lawfully and in due manner, by the then inhabitants and resiants paying scot and bearing lot within the ward aforesaid according to the custom of the said ward and

(2) Qu, Whether the situation of the Guildhall should not be alleged.

the court of wardmote aforesaid, for and during all the said time immemorially used and approved of, elected into the office of one of the constables in and for the said ward for one whole year then next ensuing, and until another person should be elected to the said office, for preserving the peace of our said lord the king, and for the apprehending of rogues, vagabonds, and other suspicious persons within the said ward for the public good; and that the said F. M. afterwards, to wit, on the said ——— day of ———, in the ——— year aforesaid, at London aforesaid, in the parish and ward aforesaid, had due notice thereof from A. B. gentleman, then being vestry clerk of the parish of C. C. and then and there was duly required to appear amongst others in the said court, to be holden before the then mayor and aldermen of the said city of L. at the Guildhall of the same city, on Monday next after the feast of the Epiphany then next following, there to take his corporal oath for the due execution of his said office, and to execute his said office; yet the said F. M. not regarding his duty in this behalf, but intending and endeavouring wholly to neglect and omit the due execution of his said office, on the said Monday next after the feast of the Epiphany, and continually afterwards until the day of the taking of this inquisition, (although often duly requested, to wit, at London aforesaid, in the parish and ward aforesaid,) hath altogether voluntarily, obstinately, and contemptuously, refused and denied, and yet doth refuse and deny, to take his said oath for the due execution of his said office, or to execute his said office in any manner whatsoever, contrary to his duty in that behalf, in manifest contempt of our said lord the king and his laws, to the great hindrance of justice, and against the peace, &c.

Second count—stating a custom to choose constables within and for the several precincts of the said ward, and stating the election of the defendant to be constable for a particular precinct, and his refusal as before.

In the original Ind. C. C. A. 55. is another count, stating the election of the defendant at a court of wardmote, duly held according to the custom of the city.

214. *Indictment against a headborough for not taking the office after a due election (a.)*

That our said sovereign lord the king and his predecessors, from time whereof the memory of man is not to the contrary, have had and held, and have been accustomed to have and hold, a court of view of frankpledge once in every year, before the sheriff of the county of M. for the time being, in the torn of the sheriff of M. made through the hundred of O. in the county of M. within the month after Easter in every year, and at the same court, when holden, there now is and from the time whereof the memory of man is not to the contrary, hath been a certain ancient and laudable custom there used and approved of, to wit, that certain inhabitants and residents, within the said hundred, were then and there sworn to charge and inquire of and present those things that belonged to them in that court to present, which said jurors, so sworn and charged, also at that court choose and present, and during all the time aforesaid, have chosen and presented, and have been used and accustomed, and of right ought to choose and present, two proper persons of the inhabitants and residents in the said parish, within the hundred aforesaid, in the county aforesaid, to be headboroughs within and for the said parish, for the year then ensuing, and until other inhabitants and residents of the said parish should be and are chosen and sworn into the said office, for the preserving the peace of our said lord the king, and for the apprehending of rogues, vagabonds, and other suspicious persons within the said parish, and for the doing of all other matters relating to the said office of headborough; and that during all the time aforesaid, there was and yet is an ancient custom used and approved at the said court, that the said persons, so chosen and presented, should have notice given to them of such their said election, and be summoned to appear in the said court upon such notice and summons, and then and there take their corporal oath for the due execution of their said office, and to execute the same; and the jurors aforesaid, now here sworn upon their oath aforesaid, further present, that at a court of view of frankpledge of our said lord the king, holden

(a) See p. 161.

before S. F. esquire, and I. S. esquire, then and yet sheriff of the county aforesaid, in the torn of the said sheriff, through the hundred of O. in the county aforesaid, within the month after Easter, in the year of our Lord ———, to wit, on ———, within the hundred of O. aforesaid, in the county aforesaid, C. D., E. F., &c. good and lawful men, inhabiting and residing within the hundred aforesaid, were then and there sworn and charged, according to the custom of the said court, to inquire of and present those things that belonged to them in that court to present; and the same jurors, at the said court so sworn and charged, according to the custom of the said court, did choose and present A. B. of the parish of St. G. the Martyr aforesaid, in the county aforesaid, yeoman, then being one of the inhabitants and residents within the same last-mentioned parish, to be headborough within and for the said parish, and to execute that office for the year then ensuing, and until another inhabitant and resident in the said parish last mentioned should be chosen and sworn into that office, in the place and stead of the said A. B. for the preserving of the peace of our said lord the king, and for the apprehending of rogues, vagabonds, and other suspicious persons, within the said parish; and for doing and performing of all matters relating to the said office of headborough, he the said A. B. then and there and long before and ever since being an inhabitant and resident within the same parish, and a fit and proper person to execute the said office as aforesaid; and that he the said A. B. after his being so chosen into the said office, to wit, on, &c. at, &c. had notice thereof, and by a certain summons in writing, was required personally to be and appear in the said court on the said ——— day of ———, in the ——— year aforesaid, and then and there take his corporal oath for the due execution of the said office, and to execute the same; which summons, afterwards, to wit, on the same ——— day of ———, in the year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to and left with him the said A. B.: nevertheless, the said A. B. not regarding his duty in this behalf, but intending and endeavouring the due execution of the said office totally to neglect and omit, after his being so chosen into the said office, and after such notice and summons as aforesaid, to wit, on the said ——— day of ———, in the year aforesaid, did obstinately refuse to

appear in the said court, and to take upon himself the said office, and to take the oath for the execution thereof, and he the said A. B. voluntarily, unlawfully, obstinately, and contemptuously, hath hitherto refused, and still doth refuse to be sworn into and execute the same office, to wit, at the parish of ———— aforesaid, in the county aforesaid, to the great hindrance and delay of justice, and against the peace, &c.

215. *Indictment against a gaoler for wilfully permitting one under sentence of transportation for felony to escape (b).*

That at the general quarter session of the peace holden at W. in and for the county of S. on, &c. before T. C. &c. {the names of the justices,} and others their fellows, justices assigned to keep the peace of our said lord the king

(b) This was the form of indictment used in the case of *R. v. Burridge*, 3 P. Wms. 479. for aiding and assisting a felon under sentence of transportation to escape, the part after the * having been added, to render it applicable to the case of a gaoler? the remainder of the original indictment is given in the next precedent. In the C. C. A. 338. is an indictment, as for a misdemeanor, against a gaoler for wilfully permitting a prisoner to escape, who was under sentence of imprisonment for the term of six months, after a conviction of grand larciny; but it seems that it ought to have been laid as a felony. See *R. v. Burridge*, 3 P. Wms. 479.

An officer who voluntarily suffers an escape, incurs the same degree of guilt, and is liable to the same measure of punishment with the delin-

quent who has escaped, whether it be treason, felony, or trespass. 1 Hale, 234. 2 Haw. c. 19. s. 22. And though it is essential to allege and prove, that the party was in *actual custody*, and that he was guilty of a *specific offence*, it is not material at what stage the escape is suffered, whether between the arrest and commitment of the principal, or before or after his trial, or before or after his attainder. 2 Haw. c. 19. s. 22. Summ. 114. Dy. 99. 3 P. Wms. 479. But if the defendant has not been convicted, it is necessary to allege and prove, that he had committed a specific felony, 2 Haw. c. 19. s. 14. Cro. Eliz. 52. Het. 73. Summ. 110.; though it seems to be otherwise, when the indictment is for a *negligent escape*. Ib.

in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed in the said county, by the oath of, *(the grand jury)* gentlemen, good and lawful men of the county aforesaid, impanelled, sworn, and charged to inquire for our said lord the king, for the body of the county aforesaid, it was presented that W. P. late of, &c. *(setting forth the indictment for grand larciny.)* And the jurors aforesaid, now sworn here, upon their oath aforesaid, do further present, that at the same general quarter session of the peace of our said lord the king, held at W. in and for the said county of S. upon, &c. the aforesaid W. P. was duly tried and convicted of the felony above mentioned, charged upon him as aforesaid; and that it was then and there adjudged by the same court, that the said W. P. should be transported for the space of seven years, according to the form of the statutes, as by the record thereof and proceedings remaining amongst the records of the general quarter sessions of the peace of the said county of S. at W. in the county aforesaid, more fully appears. And the jurors aforesaid, now sworn here, upon their said oath, further say, that the aforesaid W. P. being so as aforesaid tried and convicted of the said felony, was then and there, to wit, at the same general quarter session of the peace of our said lord the king, held at W. in and for the county aforesaid, on, &c. committed by the same court to his majesty's gaol at I. in the county aforesaid, upon and in execution of the said judgment for the felony aforesaid.* And the jurors aforesaid, now sworn here, upon their oath aforesaid, do further present, that A. B. late of C. in the county aforesaid, yeoman, then being keeper of his majesty's gaol of I. aforesaid, in the county aforesaid, and having the custody of the said W. P. for the cause aforesaid, before then lately committed to the said gaol for the cause aforesaid, on, &c. *well knowing* that the said W. P. then a prisoner in the said gaol, and in the custody of the said A. B. as aforesaid, had been convicted and committed to the said gaol in execution of and for the felony aforesaid, and did then and there remain so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. *did voluntarily and felon-*

ously permit and suffer (c) the said W. P. then and there being in the said gaol, in the custody of him the said A. B. and so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, to escape and go at large, whithersoever he would, out of the said gaol and custody; whereby he the said W. P. did then and there (d) escape from and out of the said gaol, and go at large, to wit, at, &c. against the peace, &c.

216. Against a private person for breaking gaol, and assisting a felon to escape, who was under sentence of transportation (e).

(As in the preceding pr. to the.) And the jurors aforesaid, now sworn here, upon their said oath, further present, that T. B. late of B. in the county of S. tailor, being a prisoner in his majesty's gaol at L. aforesaid, in the county aforesaid, on, &c. and well knowing that the aforesaid W. P. then also a prisoner in the said gaol, had been convicted of, and committed to the said gaol in execution of and for the felony aforesaid, and did then and there remain so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, afterwards, that is to say, on, &c. with force and arms, at L. aforesaid, in the county aforesaid, did wilfully and feloniously rescue the said W. P. then and there being in the said gaol so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, from and out of the said gaol, so that he the said W. P. did make his escape out of the said gaol, and then and there did wilfully and feloniously aid and assist the said W. P. then and there being in the said gaol so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, in making his escape out of the said goal; and that the said W. P. by the aid and assistance of him the said T. B. did then and there make his escape from and out of*

(c) Essential, see 2 Haw. c. 19. s. 14.

(d) This is essential, see 2 Haw. c. 19. s. 14. c. 21. s. 3. Keil. 78. B. Escape, 52.

(e) A private person, who having an offender in lawful custody suffers an escape, incurs the same degree of guilt with an officer. 2 Haw. c. 20. s. 1.

the said gaol, and go at large, to wit, at I. aforesaid, in the county aforesaid. And the jurors aforesaid, now sworn here, upon their said oath further say, that the said T. B. being a prisoner in his majesty's said gaol at I. aforesaid, in the county aforesaid, on, &c. afterwards, that is to say, on the same ——— day of ———, in the ——— year aforesaid, with force and arms, at I. aforesaid, in the county aforesaid, did wilfully and feloniously (f) break the said gaol, and rescue the said W. P. then and there being in the said gaol so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, from and out of the said gaol, so that he the said W. P. did make his escape out of the said gaol, and then and there did wilfully and feloniously aid and assist the said W. P. then and there being in the said gaol, so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, in making his escape out of the said gaol; and that the said W. P. by the aid and assistance of him the said T. B. did then and there make his escape from and out of the said gaol, and go at large, to wit, at I. aforesaid, in the county aforesaid, against the peace, &c.

217. *Indictment at common law against a constable for negligently permitting a man to escape that was committed for a rape.*

That on, &c. at, &c. one J. S. was brought by one J. B.

(f) At common law it was felony to break out of a gaol or prison, whether the cause of commitment was criminal or civil, 1 Hale, 612. 2 Bac. Ab. 635. But by the stat. 1 E. 2. at. 2. it is enacted, "that none from thenceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause, for which he was taken and imprisoned, did require such judgment, if he had been convict thereon, according to the law and custom of the realm;" and, therefore, it is

necessary in an indictment for this offence, to shew that the party was in prison for an offence requiring judgment of life or member. 2 Haw. c. 18. s. 20. To allege generally, *quod felonice fregit prisonam*, is insufficient. *Ib.* see p. 167. 8. But to break from any lawful custody is punishable as an high misprision by fine and imprisonment, though the offence, by the intervention of the stat. does not amount to felony. 2 Haw. c. 18. s. 30. The same rules apply as to an indictment for an escape. *Ib.*

then being one of the constables of the same parish, before A. C. esq. then and yet being (*allege that he was a justice, as in pr. 196,*) and the said J. S. then and there was charged by one D. T. spinster, upon the oath of the said D. with having feloniously ravished the said D. against her will; and that the said J. S. then and there was examined before the said A. C. the justice aforesaid, touching the aforesaid offence to him as above charged; upon which the said A. C. so being such justice as aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date, &c. directed to the keeper of, &c. commanding him the said keeper, or his deputy, that he should receive into his custody the said J. S. brought before him, and charged upon the oath of the said D. T. with the premises above specified; and the said justice by the aforesaid warrant did command the said keeper of, &c. to safely keep him there until he by due course of law should be discharged; which same warrant, afterwards, to wit, on, &c. at, &c. was delivered to the said J. B. then and there being one of the constables of the same parish as aforesaid, and then and there having the said J. S. in his custody for the cause aforesaid (g), and the said J. B. then and there was required and commanded by the said A. C. the aforesaid justice, immediately to convey the said J. S. to the said gaol of, &c. and to deliver him the said J. S. to the keeper of the said gaol, or his deputy, together with the warrant aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. B. late of, &c. baker, afterwards, to wit, on, &c. then as aforesaid, being one of the constables of the said parish, and then having the said J. S. in his custody for the cause aforesaid, at, &c.* the said J. S. out of the custody of him the said J. B. unlawfully and negligently did permit to escape, and go at large whithersoever he would, whereby the said J. S. did then and there escape and go at large whithersoever he would, to wit, at, &c. against the peace, &c.

(g) Every indictment for an escape must shew, that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion, and it

is not sufficient to say, that he was in the defendant's custody, AND charged with such a crime; for that is no allegation, that he was in custody upon that charge. 2 Haw. c. 97. s. 14.

218. *Indictment at common law against a constable for negligently permitting a man to escape, who was arrested by him for a misdemeanor (h).*

That on, &c. at, &c. one S. C. came before A. K. esq. (*alleging that he was a justice, as in pr. 196,*) and the said S. C. did then and there, on his oath, before the same justice, charge, accuse, and give information against one W. M. of the parish aforesaid, in the county aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of M. N. the owner thereof, without his consent, at O. in the county aforesaid; whereupon he the said A. K. as such justice as aforesaid, did then and there, to wit, at, &c. make a certain warrant, under his hand and seal, in due form of law, directed to the constable or headborough of the parish of P. aforesaid, in the county aforesaid, thereby requiring them to take the body of the said W. M. and bring him before the said A. K. the justice aforesaid, to answer to such matters and things as should be alleged against him touching the said misdemeanor: which said warrant, afterwards, to wit, on the same day, and year aforesaid, at, &c. was delivered to one T. W. then being one of the constables of the said parish of P. in due form of law to be executed; by virtue of which said warrant the said T. W. afterwards, to wit, on, &c. at, &c. did take and arrest the body of the said W. M. and him the said W. M. in his custody for the cause aforesaid, had; nevertheless, the said T. W. of the said parish of P. in the county aforesaid, yeoman, afterwards, to wit, on, &c. the duty of his office in that respect not regarding, at, &c. (*Conclude as in the last pr. from the*.*)

219. *Indictment against the turnkey of a common gaol for a misdemeanor, in aiding a prisoner, committed by virtue of a justice's warrant for petit larciny, to make his escape.*

That on, &c. A. B. esq. then being one of the justices, &c. (*as in pr. 196, from * to ***.) in due form of law did make his warrant of commitment under his hand and seal, to wit, at T. in the said county of C. bearing date the

(h) See the notes, p. 627, 9, 30, 1.

same day and year aforesaid, directed to the keeper of the common gaol in and for the said county of C. by which said warrant of commitment the said keeper was required to receive into his custody the body of C. D. who was therewith sent to him the said keeper (the said C. D. having been brought before him the said justice, and charged upon the oath of E. F. with having feloniously stolen and carried away a ————— of him the said E. F. of the value of ten-pence, at T. aforesaid, in the county aforesaid,) and him safely keep until the then next general quarter session of the peace to be holden in and for the said county of C. or until he should be thence delivered by due course of (i) law, as by the same warrant more fully appears; by virtue of which said warrant of commitment, afterwards, to wit, on, &c. at, &c. G. H. then being keeper of the common gaol of the said county of C. did receive the said C. D. into his custody in the said common gaol there situate. And the jurors aforesaid, upon their oath aforesaid, do further present, that D. M. late of the castle of C. aforesaid, in the county aforesaid, labourer, well knowing the premises, and not regarding the laws of this realm, nor fearing the pains and penalties therein contained, afterwards, and whilst the said C. D. was a prisoner as aforesaid, to wit, on, &c. with force and arms, in the gaol aforesaid, at, &c. in the county aforesaid, unlawfully, voluntarily, and unjustly did take, and cause to be taken, certain iron chains and fetters, then affixed and fastened upon the legs of the said C. D. from and off the same, he the said C. D. then being such prisoner as aforesaid; and also did permit him the said C. D. to go out at a certain back-door of and belonging to the said gaol, and over a certain wall surrounding and inclosing the same, and to go at large out of the said gaol whithersoever he would (he the said D. M. then and there having the custody and keeping of the keys of and belonging to the said gaol.) And the jurors aforesaid, upon their oath aforesaid, do say, that the said D. M. then and there, in manner and form aforesaid, was aiding and assisting the said C. D. to make his escape from and out of the said prison, against the peace, &c.

Second count.) That the said C. D. on, &c. was lawfully committed to the custody of the said G. H. then

(i) As the warrant may be.

being keeper of his said majesty's gaol of and for the said county of C. to wit, at, &c. aforesaid, in the said county of C. by virtue of a certain warrant of commitment duly made under the hand and seal of the said A. B. then being such justice as aforesaid, bearing date the same day and year last aforesaid, upon and in pursuance of a certain charge upon oath made by the said E. F. against the said C. D. to and before him the said A. B. being such justice as aforesaid, alleging, that the said C. D. had feloniously stolen and carried away ——— of him the said E. F. of the value of ——— at T. aforesaid; and by which said last-mentioned warrant the said G. H. was required safely to keep the said C. D. until the then next general quarter-session of the peace to be holden in and for the said county of C. or until he should be thence delivered by due course of law, as by the said last-mentioned warrant more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said D. M. so having the custody and keeping of the said keys as aforesaid, and well knowing the said last-mentioned premises, afterwards, to wit, on, &c. with force and arms, at, &c. aforesaid, in the county aforesaid, unlawfully, voluntarily, and contemptuously did permit and suffer the said C. D. (then being a prisoner in the said gaol, under the custody of the said G. H. by virtue of the said last-mentioned warrant, for the cause last aforesaid,) to escape, &c. (*as in pr. 217,*) without the authority or consent of the said G. H. being such keeper as aforesaid, and without any lawful authority whatsoever. (*Conclusion as before.*)

220. *Indictment against a prisoner confined in gaol for debt (by virtue of a writ issued out of the Common Pleas, and the sheriff's warrant to the gaoler,) for attempting to break the gaol, in order to make his escape.*

That on, &c. at, &c. T. S. esquire, then being sheriff of the county aforesaid, did, in due form of law, make his certain warrant, under his hand and seal, bearing date the same day and year aforesaid, and directed to the keeper of the gaol of the said county, and also to J. C. and J. E. his bailiffs, and thereby, and by virtue of a certain writ of our sovereign lord the king to him the

said sheriff directed (a), he the said sheriff did command them the said keeper of the gaol aforesaid and also the said bailiffs, and every of them, jointly and severally, that they, some or one of them, should take J. L. if he should be found in the said sheriff's bailiwick, and him the said J. L. safely keep, so that he the said sheriff might have his body before the said justices of our said lord the king at Westminster, in eight days of St. Hilary, to satisfy R. S. as well of a certain debt of twenty pounds, which the said R. S. had recovered against him in the court of our said lord the king, before his justices at Westminster, as also of five pounds, which in our said lord the king's same court were awarded to the said R. S. for his damages which he had sustained by reason of his detaining the said debt whereof the said J. L. was convicted, as by the same warrant more fully appears (b). And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on, &c. at, &c. and within the bailiwick of the said sheriff, the aforesaid J. L. was arrested, and conveyed into, and kept and detained in, the gaol of our lord the king, of and for the county aforesaid, situate and being at the parish aforesaid, in the county aforesaid, according to the command of the aforesaid writ and warrant, for the cause in the aforesaid *writ and* warrant expressed, there to remain until he should be thence discharged by due course of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L. late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on &c. at the parish aforesaid, in the county aforesaid, (then and there being in the custody of L. S. keeper of the gaol of our lord the king of the county aforesaid, for the cause in the writ and warrant aforesaid specified,) with force and arms, unlawfully, wilfully, and injuriously, did attempt to break the aforesaid gaol, and to escape and go at large where he would, (by then and there cutting and sawing two iron bars of the said gaol, and also by then and there breaking, cutting, and removing a great quantity of stone, parcel of the wall of the aforesaid gaol,) against the peace, &c.

(a) Note that this precedent appears to be defective in not setting forth the writ to the sheriff, *supra* 167. *R. v. Westbury*, 8 Mod. 357.

(b) According to the terms of the writ and warrant with which the indictment must correspond.

221. *Indictment against a constable for wilfully permitting a prostitute, committed to his care by a watchman, to escape before she was taken to justice.*

Middlesex. That one R. M. late of the parish of Saint James, within the liberty of Westminster, in the county of M. labourer, being lawfully appointed one of the nightly watchmen of and for the said parish, and being in his said office and place, and duly performing his duty of such watchman there, he the said R. M. at an unreasonable time, to wit, between the hours of one and two of the clock in the morning, at the parish aforesaid, in the liberty and county aforesaid, did apprehend and take into his custody one M. P. then and there being a loose, idle, lewd, and disorderly person, and a common street-walker, and being then and there found behaving herself riotously, and walking the streets there to pick up men, in breach of his majesty's peace; and did then and there take and convey the said M. P. in his custody, to a certain prison, called the watch-house, in the said parish; and did on that occasion there deliver her into the custody of one J. B. who then and there was one of the constables of the said parish, and then and there being in the execution of his said office of such constable, as the head of the nightly watch of the said parish; and did on that occasion then and there leave her the said M. P. in charge with the said J. B. so being such constable as aforesaid, and in the execution of his said office as aforesaid; and did then and there charge and request the said J. B. so being such constable, and in the execution of his said office as aforesaid, to keep and detain the said M. P. so being such loose, idle, lewd, and disorderly person, and a common street-walker, who had been found walking the streets there to pick up men as aforesaid, in his custody, until the said M. P. could be safely and conveniently carried and conveyed before some one of his majesty's justices, assigned to keep the peace of our said lord the king, in and for the said liberty, in the county aforesaid, there to be dealt with by such justice, according to due form of law, for her said offence and breach of the king's peace; yet the said J. B. late of, &c. so being constable as aforesaid, and well knowing the premises,

but (a) not regarding the duty of his office as such constable as aforesaid, then and there, unlawfully and wilfully discharged her the said M. P. from and out of his custody, before she had been carried before any justice of the peace of our said lord the king, to be dealt with according to due form of law, and would not keep or detain her in his custody for the purpose aforesaid, but wilfully suffered and permitted her the said M. P. to escape and go at large whithersoever she would (conclusion as in pr. 215.)

222. *Indictment at common law for assisting a prisoner to escape out of prison, charged with a forfeiture to the king, upon a writ issued out of the Exchequer.*

That heretofore, to wit, on, &c. there issued out of the Court of Exchequer of our lord the king, (the said court then and still being at Westminster, in the county of Middlesex,) a certain writ of our said lord the king, directed to his then sheriff of the county of S. by which said writ our said lord the king commanded the said sheriff, that he should not omit, by reason of any liberty, but enter the same, and take J. R. by his body, wheresoever he the said sheriff should find him within his bailiwick, and him safely and securely keep, so that he the said sheriff might have his body before the barons of the Exchequer of our said lord the king, at Westminster, on, &c. to answer to our said lord the king, concerning certain articles whereof he was impeached, on a certain information exhibited before the barons of our said lord the king by his attorney-general, for a forfeiture of two thousand three hundred and thirty-two pounds, for an offence in the information aforesaid mentioned, and further to do and receive in the premises what the said court then and there should see fit to order, and that the said sheriff should have then and there that writ; and that the said writ afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to A. B. esquire, then sheriff of the county of S. aforesaid, in due form of law to be executed, by virtue of which said writ, he the aforesaid J. R. was then and there taken and imprisoned by him the said sheriff in the gaol of our said lord the king, com-

(a) Not in the original, C. C. A. 342.

monly called the new gaol, in Southwark, situate in the parish of St. George, Southwark, aforesaid, in the said county of S. to answer to our said lord the king of and concerning the premises in the said writ above specified. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. R. being so in the said gaol in custody as aforesaid, for the cause aforesaid, one R. W. late of, &c. well knowing the premises, but contriving and intending to procure the escape of him the said J. R. out of the said gaol, afterwards, to wit, on, &c. at, &c. with force and arms, unlawfully, knowingly, and advisedly did bring, and cause to be brought and delivered, to the said J. R.) then and there being in the gaol aforesaid, in the custody of the said A. B. esquire, then sheriff of the said county of Surrey, (for the cause in the writ above specified,) one rope and two iron hooks, to the intent and purpose that the said J. R. might and should thereby be enabled to make his escape out of the said gaol. And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the contrivance and intention of the said R. W. and by means of the said rope and hooks, and by the procurement of the said R. W. he the said J. R. afterwards, to wit, on the same day and year last aforesaid, at the parish aforesaid, in the county of S. then and there being in the custody of the said sheriff, in the said gaol, for the cause in the writ above specified, with force and arms, against the will, and without the license or consent of the said sheriff, or of the then gaoler of the said gaol, unlawfully and voluntarily did escape and go at large out of the said gaol from the custody of the said A. B. then sheriff of the said county of S. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. W. on, &c. with force and arms, at the parish aforesaid, in the said county of S. wilfully, advisedly, unlawfully, and against the will, and without the license or consent, of the said then sheriff of the said county of S. and also against the will, and without the license or consent, of the then gaoler of the said gaol of our said lord the king of his said county of S. did aid, abet, comfort and assist the said J. R. so being in the said gaol as aforesaid, for the cause aforesaid, in making his escape from the said gaol and custody of the said sheriff, in contempt of our said lord the king and his laws, and against the peace, &c.

223. *Indictment for conveying files into a prison in order to facilitate the escape of a prisoner (b).*

That on, &c. at the parish of M. in the borough of Stafford, in the county of Stafford, F. N. esquire, then

(b) By Stat. 16 Geo. 2. c. 31. s. 1. if any person shall by any means whatsoever be aiding or assisting to any prisoner to attempt to make his escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petit larciny, or lawfully committed to or detained in any gaol for treason, or any felony, except petit larciny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported for seven years; and in case such prisoner then was convicted of, committed to, or detained in any gaol for petit larciny, or any other crime, not being treason or felony, expressed in the warrant of commitment or detainer as aforesaid, or then was in gaol upon any process whatever, for any debt, &c. amounting to one hundred pounds, every person so offending, and being thereof lawfully convicted, shall be deemed guilty of a misdemeanor, for which he shall be liable to be fined and imprisoned.

s. 2. If any person shall convey, or cause to be conveyed, into any gaol or prison, any

vizor or other disguise, or any instrument or arms, proper to facilitate the escape of prisoners, and the same shall deliver, or cause to be delivered, to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison, every such person, although no escape, or attempt to escape, be actually made, shall be deemed to have delivered such vizor, &c. with an intent to aid and assist such prisoner to escape, or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petit larciny, or lawfully committed to or detained in any gaol for treason, or any felony, except petit larciny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall in like manner be adjudged guilty of felony, and be transported for seven years; but in case the prisoner, to whom or for whose use such vizor, &c. shall be so delivered, then was convicted, committed, or detained for petit larciny, or any other crime, not being treason or felony, expressed in the warrant of commitment or

being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of Stafford, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, in due form of law, did make *his warrant of commitment*, under his hand and seal, bearing date the same day and year aforesaid, directed (*as in the warrant,*) to the keeper of his majesty's gaol at Stafford, (the same being the common gaol of our said lord the king in and for the county of Stafford aforesaid, situate in the parish and borough aforesaid;) by which said warrant of commitment the said justice of the peace did require the said keeper to receive into his custody the body of one J. L. who was therewith sent to him the said keeper, (the said J. L. having been brought before him the said justice, and charged upon the oath of S. S. esquire, and J. S. *with having feloniously stolen* (c), taken, and carried away, from and out of a barn of him the said S. S. situate at T. in the said county of Stafford, a certain quantity of barley, of the value of ten shillings, the property of him the said S. S.) and him

detainer, or upon any process for any debt, &c. amounting to one hundred pounds, every such person so offending, and being thereof lawfully convicted, shall be adjudged guilty of a misdemeanor, for which he shall be liable to a fine and imprisonment.

s. 3. If any person shall aid or assist any prisoner to attempt to make his escape from any constable, headborough, tythingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him to gaol by virtue of a warrant of commitment for treason or any felony, (except petit larciny,) expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make his escape from

on board any boat, ship, or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns, or agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation; then every person so offending, and being lawfully convicted thereof, shall be adjudged guilty of felony, and shall be transported for seven years.

s. 4. Prosecution to be commenced within one year.

s. 5. Persons ordered for transportation, and returning, &c. felony.

(c) A commitment on suspicion only will not warrant a conviction under this act, *Greeniff's case*, Leach, 401.

safely keep, until he should be discharged by due course of law (d), as by the said warrant more fully appears; by virtue of which said warrant of commitment, he the said J. L. afterwards, to wit, on the same day and year aforesaid, was conveyed, committed, and delivered to his majesty's said gaol, at the parish aforesaid, in the borough and county aforesaid, for the said cause in the said warrant of commitment mentioned and expressed, to wit, for grand larciny, and was kept and detained therein, under the custody of W. S. then being keeper of the said gaol, for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. B. late of the said parish of M. in the borough of Stafford aforesaid, in the county aforesaid, labourer, well knowing the premises, and not regarding the laws and statutes of this realm, nor, fearing the pains and penalties therein contained, afterwards, on, &c. with force and arms, at, &c. feloniously did convey, and cause to be conveyed, into the said gaol, two steel files, being instruments proper to facilitate the escape of prisoners; and the same files, being such instruments as aforesaid, then and their feloniously did deliver, and cause to be delivered, to the said J. L. (he the said J. L. then and there being a prisoner in the said gaol, and there lawfully detained for the felony and larciny aforesaid, in the said warrant of commitment above mentioned and expressed,) without the consent or privity of the said W. S. then being keeper of the said gaol (under W. A. esquire, then sheriff of the said county of Stafford,) or any under keeper of the same gaol; which said files, being such instruments as aforesaid, were then and there so conveyed into the said gaol, and delivered to the said J. L. as aforesaid, with a felonious intent to *aid and assist* (e) the said J. L. so being such prisoner and in custody as aforesaid, to escape, and attempt to escape, from and out of the same gaol, against the form, &c. and against the peace, &c.

(d) As in the warrant.

(e) In an indictment for *aiding and assisting*, &c. it is not necessary expressly to allege

an attempt to escape, since it is implied in these words. See Tilley's case, Leach, 759. and the Pr. Trem. 244, 246.

RESCUES, &c.

224. *Indictment against two for a rescue, one of them being in custody of an officer of the marshal's court upon process, &c.*

That on, &c. our said lord the king, by his writ issued out of the court of our said lord the king of his palace of Westminster, under the seal of the said court, bearing date the same day and year aforesaid, directed to the bearers of the verge of the household of our said lord the king, officers and ministers of the court of our said lord the king of his palace of Westminster, and every of them, did command them, and every of them, that they should take, or one of them should take, by their bodies, R. A. and W. C. if they should be found within the jurisdiction of the court aforesaid, and them safely keep, so that they might have, or one of them might have, their bodies before the judges of the court aforesaid, at the then next court of the palace of our said lord the king of Westminster aforesaid, on, &c. then next following to be holden at S. in the county of Surrey, to answer T. W. of a plea of trespass upon the case, to the damage of the said T. W. of £—; which said writ afterwards, and before the delivery thereof, &c. (*state the indorsement, &c. as in pr. 148. (f).*) which same writ so indorsed, afterwards, and before the return of the same, to wit, on, &c. at, &c. and within the jurisdiction of that court, was delivered to one G. N. then one of the bearers of the verges of our said lord the king, officers and ministers of the court of our said lord the king, to be executed in due form of law; by virtue of which said writ, the said G. N. afterwards, and before the return thereof, to wit, on, &c. at, &c. and within the jurisdiction of that court, did take and arrest the body of the said R. A. in the writ aforesaid named, and him the said R. A. in his custody, by virtue of the said writ, then and there had; and that the said R. A. late of the parish aforesaid, in the county aforesaid, yeoman, and C. D. late of the same, black-

(f) See the note, p. 421. and the stat. 12 G. 1. c. 29. and 19 G. 3. c. 20.

smith, afterwards, to wit, on, &c. with force and arms, at, &c. in the county and within the jurisdiction aforesaid, in and upon the said G. N. then and there as aforesaid being one of the bearers of the verges of the household of our said lord the king, officers and ministers of the court aforesaid, and having the said R. A. in custody for the cause aforesaid, and in the due execution of his said office, then and there also being, did make an assault, and him the said G. N. then and there did beat, wound, and ill-treat: and that the said C. D. him the said R. A. out of the custody of the said G. N. and against the will of the said G. N. then and there, with force and arms, unlawfully did rescue and put at large to go whithersoever he would; and that the said R. A. himself out of the custody of the said G. N. and against the will of the said G. N. then and there, with force and arms, unlawfully did rescue and escape and go at large withersoever he would, to the great hindrance and obstruction of justice, in contempt of our said lord the king and his laws, to the great damage of the said G. N. and against the peace, &c. (*Add a count for a common assault, as in pr. 38.*)

225. Indictment against several for rescuing a person taken upon a bill of Middlesex.

That on, &c. a certain precept, commonly called a bill of Middlesex, was issued out of the court of our said lord the king, before the king himself, (the same court then and still being at Westminster, in the said county of Middlesex,) by which it was commanded to the sheriff of Middlesex that he should take (*as in the precept,*) so that he might have their bodies before our said lord the king at Westminster, on Wednesday next after fifteen days of Easter, to answer to B. H. of a plea of trespass, and also to a bill of him the said B. H. to be exhibited against the aforesaid H. O. for thirty pounds, upon premises, according to the custom of the said court; which said precept afterwards, &c. (*state the indorsement as in pr. 148.*) which same precept afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to A. B. and C. D. esquires, sheriff of the county aforesaid, to be executed in due form of law; which said A. B. and C. D. sheriff of

the county aforesaid, by virtue of the precept aforesaid, afterwards, and before the return thereof, to wit, on, &c. at, &c. did make a certain warrant of him the said sheriff, under his seal, directed to J. D., P. C. and R. R. his bailiffs of the hundred of Ossulston, in the county aforesaid, by which he commanded them, and every of them, jointly and severally, that they should take, or one of them should take, the said H. O. in the precept above named, to answer to the said B. H. of the plea of trespass aforesaid, and that the said J. D. in the warrant aforesaid named, afterwards, and before the return of the precept aforesaid, to wit, on, &c. by virtue of the precept and warrant aforesaid, at the parish of F. within the hundred aforesaid, in the county aforesaid, did take and arrest the said H. O. in the precept aforesaid above mentioned, according to the command of the precept and warrant aforesaid; upon which the said H. O. late of the said parish of Fulham, in the county aforesaid, yeoman, J. F. late of the same, yeoman, and M. W. late of the same, spinster, afterwards to wit, on, &c. with force and arms, at, &c. in and upon the said J. D. then being one of the bailiffs of the said sheriff of the county aforesaid of the hundred of Ossulston aforesaid, and in the due execution of the precept and warrant aforesaid, and in the peace of God and our said lord the king then and there also being, did make an assault, and him the said J. D. then and there did beat, wound, and ill-treat; and that the said J. F. and M. W. him the said H. O. out of the custody, and against the will, of the said J. D. then and there unlawfully did rescue and put at large to go whithersoever he would; and that the said H. O. himself out of the custody, and against the will, of the said J. D. then and there unlawfully did rescue and escape at large whithersoever he would, to the great hindrance and obstruction of justice, in contempt of our said lord the king and his laws, to the great damage of the said J. D. and against the peace, &c. (*Add a count for a common assault.*)

226. *Indictment for rescuing goods distrained for rent.*

That on, &c. one M. P. of the parish of S. in the county of M. in due form of law did take and distrain (*set out the property and its value*) of the goods and chattels of

one A. H. widow, then being in a certain lodging room in the dwelling house of the said M. P. situate in the parish and county aforesaid, which same distress was taken by him the said M. P. for the sum of three pounds and ten shillings, then due for rent, for one whole year, in arrear from the said A. H. to him the said M. P. for the lodging aforesaid; and that the said M. P. the said goods and chattels then and there had and detained in his custody, for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. late of, &c. afterwards, to wit, on, &c. with force and arms, at, &c. in the county aforesaid, the said goods and chattels, so as aforesaid by the said M. P. taken and distrained, and in the custody of him the said M. P. then being, from and out of the custody, and against the will of him the said M. P. then and there unlawfully and with force and violence did rescue, take, and carry away, (the said sum of three pounds and ten shillings, for the said rent in arrear, as aforesaid due, or any part thereof, not being then paid,) and other wrongs to the said M. P. then and there did, to the great damage of the said M. P. and against the peace, &c.

227. Indictment against a felon, for being at large before the expiration of his term of transportation (g).

That at the general session of the delivery of the gaol of our lord the king of Newgate, holden for the county

(g) By stat. 6 G. 2. c. 15. s. 1. "if any felon, or other offender, already ordered, or hereafter to be ordered, for transportation, or who hath already, or hereafter shall agree, to transport him or herself, on certain conditions, to any of his majesty's colonies and plantations in America, either for life or any number of years, shall be afterwards at large within any part of the kingdom of Great Britain, without some lawful cause, before the expiration of the term for which he, she, or they were so or-

dered to be transported, or had so agreed to transport him or herself; all and every such person or persons, being thereof lawfully convicted, shall suffer death, as in cases of felony, without benefit of clergy.

Sec. 2. enacts, that offenders shall be tried as mentioned in stat. 6 Geo. 1. c. 23. which, by sec. 7. directs, that they may be tried either before justices of assize, oyer and terminer, or gaol-delivery for the county, city, or liberty, where he, she, or they shall be apprehended and taken, or be-

of Middlesex, at Justice-hall, in the Old Bailey, in the suburbs of the city of London, on, &c. before, &c. and others their fellows, justices of our said lord the king,

fore any of those justices for that county, city, or place, from whence, he, she, or they were ordered to be transported; and that the certificate * of conviction and order, &c. by the clerk of assize, &c. shall be sufficient proof that such persons have before been convicted and ordered to be transported. And by s. 5. of the same stat. persons contracting for transporting such felons may secure them as they think fit; and those who rescue, &c. shall suffer death.

Sec. 3. of the stat. 16 Geo. 2. allows a reward of twenty pounds to any person who shall discover, apprehend, and prosecute to conviction of felony without benefit of clergy, any such offender so found at large within the kingdom of Great Britain, to be paid in like manner as is directed respecting highwaymen. Vide also stat. 4 Geo. 1. c. 11. and 8. Geo. 3. c. 15. The latter gives power to the judge to make an order of transportation after the assizes are over, where the felon has been capitally convicted, reprieved, recommended to mercy, and pardoned upon condition of transportation †.

By stat. 19 Geo. 3. c. 74. s. 1. when any person shall be

lawfully convicted of any grand or petit larceny, or other crime, for which he or she shall be liable to be transported to any of his majesty's colonies or plantations in America, the court may order such person to be transported to any parts beyond the seas, whether the same be in America or elsewhere.

By s. 2. it is enacted, "that when any such person, who hath already been, or shall hereafter be convicted, shall, in consequence thereof, be ordered to be transported to any parts beyond the seas, or if his majesty, his heirs, and successors, shall hereafter be graciously pleased to extend the royal mercy to any offender convicted or attainted of any felony, by which he or she is excluded from the benefit of clergy, or of such statutes as are equivalent thereunto, upon the condition of transportation to any parts beyond the seas as aforesaid, then, and in any such cases, all laws, statutes, usages, and customs, now in force with regard to the transportation of criminals to any of his majesty's colonies or plantations in America, and their punishment for being afterwards at large, within any

* The act directs, that this shall "briefly, and in a few words, contain the effect and tenor," &c. which shews that it is not necessary to set out the whole record of conviction in an indictment.

† By the same statute, such persons found at large, &c. shall suffer death; and those apprehending, &c. shall have a like reward as before mentioned. See Madan's case, Leach, 293.

assigned to deliver the gaol of our said lord the king of Newgate of the prisoners therein being, E. L. late of, &c.

part of the kingdom of Great Britain, before the expiration of the several terms for which they were ordered to be transported, or had agreed to transport themselves, and particularly the several provisions contained in an act made in the fourth year, &c. (it here sets out the titles of the before-mentioned acts of 4 Geo. 1. 6 Geo. 1. 16 Geo. 2. and 8 Geo. 3.) shall take place, be in force, and endure with regard to the transportation of all such offenders as aforesaid, to any part or parts beyond the seas, and with regard to their punishment for being afterwards at large in this kingdom before the expiration of their respective terms, in like manner as if the same had been repeated and specially inserted in this act."

s. 3. When any person is convicted of felony for which he shall be liable to be burnt in the hand, the court may, instead thereof, impose on him a moderate fine, or order him to be whipped*: but, by s. 4. the act shall not abridge the power vested in the court of imprisoning offenders.

s. 5. His majesty is hereby empowered to appoint supervisors to erect penitentiary houses in any one of the counties of Middlesex, Essex, Kent, or Surry, for the purpose of confining and employing convicts therein.

Continued by several acts, see 53 G. 3. c. 39.

By 24 Geo. 3. c. 56. s. 6. it shall be lawful for his majesty, by an order in writing, to be notified by one of his principal secretaries of state, or for any three or more justices of the peace acting in, &c. to direct the removal of any male offender, who shall be under sentence of death, but reprieved during his majesty's pleasure, or under sentence or order of transportation, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol or prison in which such offender shall be confined, to such place of confinement within England, or the dominion of Wales, either at land, or on board any ship or vessel in the river Thames, or any navigable or other river, or within the limits of any port of England or Wales, as his majesty, or any three of such justices, authorized as aforesaid, shall from time to time appoint, under the management of any overseer to be appointed, &c.

By s. 1. his majesty in council may appoint to what place beyond the seas felons shall be sent.

Continued by several subsequent acts, see 53 G. 3. c. 39.

* Manslaughter excepted.

according to due course of law was tried, for that he, *(set out the indictment,)* and thereupon, by a certain jury of the country, between our said lord the king and the said E. L. in that behalf then and there, to wit, on the — day of — in the — year aforesaid, at and in the court of the said session, so holden as aforesaid, duly taken, he the said E. L. was duly convicted of the said felony upon the indictment aforesaid; and thereupon the aforesaid E. L. by the above-named justices of our said lord the king, assigned to deliver his gaol of Newgate aforesaid of the prisoners therein being, was ordered to be “transported beyond the seas for and during the term of seven years,” as by the record thereof more fully appears; and that he the said E. L. afterwards, to wit, on the — day of —, in the said — year of the reign of our said lord the king, with force and arms, feloniously, and without any lawful cause whatsoever was at large within this kingdom of Great Britain *(h)*, to wit, at, &c. in the county aforesaid, before the expiration of the term of seven years, for which he the said E. L. was so ordered to be transported as aforesaid, against the form of the statute, &c. and against the peace, &c. *(i)*.

228. *Indictment against a felon under sentence of transportation, for being at large before the expiration of the term, after a conviction at the quarter sessions.*

That at the general quarter session of the peace of our lord the king, holden at Lancaster, in and for the county palatine of Lancaster, on Tuesday, to wit, the — day of —, in the 51st year of the reign of our sovereign lord George the third, by the grace of God of the united kingdom of Great Britain and Ireland king, defender of

(h) See note *(h)*, p. 650.

(i) One Benjamin Fisher was tried on an indictment formed in this manner at Worcester summer assizes, 1790, convicted, and condemned to die.

See an indictment for being at large in Great Britain after sentence of death, respite, and order of transportation, which was made at the assizes next after the trial. *Cro. Cir. Ass.* 411.

the faith, before E. H. and E. T. esquires, and others their companions then and there present, justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the same county perpetrated, that same general quarter session of the peace of our said lord the king, was adjourned by the aforesaid justices of our said lord the king, in that court being, until Thursday, to wit, the — day of the same month of —, in the 51st year of the reign aforesaid, to be holden in Preston, in Amounderness, in and for the same county, to do further as the court there should consider. And on the said Thursday, the — day of —, aforesaid, in the year aforesaid, at the same general quarter session of the peace of our said lord the king, holden by the said adjournment at Preston aforesaid, in and for the said county, before J. P. &c. and others their companions, then and there present, justices of our said lord the king, &c. that same general quarter session of the peace of our said lord the king, holden by adjournment as aforesaid, was further adjourned by the same last-mentioned justices of our said lord the king, in that court being, until Monday, to wit, the — day of the same month of —, in the 51st year of the reign aforesaid, to be holden at Wigan, in and for the said county, to do further as the court there should consider; and on the said Monday, the — day of — aforesaid, in the year aforesaid, the same session of the peace of our said lord the king, was holden by the adjournment last aforesaid, at Wigan aforesaid, in and for the said county, before R. G. &c. esquires, and other their companions, then and there present, justices, &c. at which said session of the peace of our said lord the king, holden by the said last-mentioned adjournment at Wigan aforesaid, in and for the said county, the said — day of —, in the 51st year of the reign aforesaid, upon the oaths of W. H. &c. (*the names of the grand jury;*) gentlemen, good and lawful men of the county of Lancaster aforesaid, then and there sworn and charged to inquire for our said lord the king, and for the body of the said county, it was presented that one W. W. late of the township of O. in the county of L. labourer, on the — day of —, in the 51st, &c. (*here set out the indictment for simple larciny,*) whereupon the sheriff

of the said county was commanded to apprehend and take the body of the said W. W.; and thereupon, at the same general quarter session of the peace, holden by the said last-mentioned adjournment, at Wigan aforesaid, in the county aforesaid, the said — day of —, in the 51st year of the reign aforesaid, before the said justices of our said lord the king last above named, came the said W. W. in the custody of the governor of the house of correction in Preston aforesaid, (into whose custody, in the same prison, he the said W. W. had been before committed,) and having had hearing of the indictment aforesaid, was instantly asked to speak to the said court, how he would acquit himself of the premises aforesaid, in the indictment aforesaid, so charged and imposed on him, who said that he was guilty of the felony aforesaid, in the indictment aforesaid, on him so charged and imposed, as by the form of the said indictment was charged and supposed to be, and upon that it was required by the court there, of the said W. W. if he had any thing to say for himself, why the court there ought not to proceed to judgment concerning him upon the said indictment, who said nothing besides what at first he had said, whereupon all and singular the premises being seen and understood by the court there, it was considered and adjudged by the court there, that the said W. W. should be sent and transported to some parts beyond the seas, for the space of seven years, pursuant to the statute in that case made and provided, as by the record thereof more fully appears; and the jurors aforesaid, now here sworn, do further present, that the said W. W. afterwards, to wit, on the — day of —, in the 54th year of the reign of our said lord the king, with force and arms, feloniously, and without any lawful excuse, was at large within (k) this kingdom of Great Britain, to wit, at Liverpool, in the said county of Lancaster, before the expiration of the said space of seven years, for which he the said W. W. was so adjudged to be transported as aforesaid, against the form of the stat. &c. and against the peace, &c.

(k) Qu. whether it would not be proper to aver, "within that part of the said united kingdom, which, at the time of the making of the stat. &c.

was the kingdom of Great Britain, to wit, at, &c."; but see note (a); p. 569. The prisoner was convicted upon this indictment, *Lanc. Sp. Ass.* 1814.

ILLEGAL ATTEMPTS, SOLICITATIONS, AND ENDEAVOURS (a).

229. *Indictment for endeavouring to seduce a soldier from his allegiance (b).*

That A. B. being a wicked and evil-disposed person, on, &c. with force and arms, at, &c. feloniously, did maliciously and *advisedly* (c) *endeavour* (d) to seduce M. L. he the said M. L. then and there being a person serving in his majesty's forces by land, from his duty and allegiance to his said majesty, against the form, &c. and against the peace, &c.

(*Second count.*) Feloniously, did maliciously and advisedly endeavour, to excite and stir up the said M. L. he the said M. L. then and there being a person serving in his majesty's forces by land as aforesaid, to commit an act of mutiny, and to commit traitorous and mutinous practices, against the form, &c. and against the peace, &c.

230. *Indictment for enticing an artificer to leave the kingdom (e).*

That A. B. late of, &c. labourer, within twelve months next before the taking of this inquisition, on, &c. with force and arms, at, &c. unlawfully did contract with one

(a) For assaults with different intents, see pr. p. 386, &c.

(b) Under the stat. 37 G. 3. c. 70. see p. 137. the preamble recites, that whereas divers wicked and evil disposed persons by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his majesty's forces; by sea or land, from their duty and allegiance to his majesty, and to incite

them to mutiny and disobedience.

(c) It was holden that this allegation was sufficient without a more express averment that the defendant knew that M. L. was a soldier. See *R. v. Fuller*, 1 Bos. & Pul. 180. and p. 156.

(d) It was holden that this averment was sufficient without setting forth the means, see p. 147. 1 Bos. & Pull. 180.

(e) Under the stat. 23 G. 2. c. 13,

I. M. he the said I. M. then and there being a manufacturer, workman, *and* artificer(*e*) of Great Britain(*f*), in the weaving of linen cloth, (*g*), then and there being a manufacture of Great Britain, to go out of this kingdom of Great Britain, into a certain foreign country, called America (*h*), such foreign country not then being within the dominion or belonging to the crown of Great Britain, in contempt, &c. against the form, &c. and against the peace, &c.

231. *Indictment for uttering seditious words.*

That A. B. late of, &c. labourer, being a wicked, seditious, and evil-disposed person, and greatly disaffected to our said lord the king, and contriving and intending the liege subjects of our said lord the king to incite and move to hatred and dislike of the person of our said lord the king, and of the government established within this realm, on, &c. with force and arms, at, &c. in the presence and hearing of divers liege subjects of our said lord the king, maliciously, unlawfully, wickedly, and seditiously did publish, utter, and declare with a loud voice, of and concerning our said lord the king, these words following, that is to say, "His majesty, George the Third, (meaning our said lord the king,) is *****; thank God for it; I (meaning the said A. B.) hope he (meaning our said lord the king) will soon be no more: damnation to all royalists," to the great scandal of our said lord the king, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace, &c. (*2d count.*) That the said A. B. being such wicked, seditious, and evil-disposed person as aforesaid, and greatly disaffected to our said lord the king,

(*e*) The words of the stat. are workman or artificer, but the conjunctive allegation is not improper, see *R. v. Myddleton*, 6 T. R. 739.

(*f*) Vide p. 650, note (*k*).

(*g*) The stat. uses the words, *or any other manufacturer.*

(*h*) It was objected that the indictment charged generally, that America was out of the

king's dominions, though the fact was notoriously otherwise, which the court ought to notice, and that it should have been stated to what part of America the manufacturer was enticed, but the court held that the verdict of the jury was conclusive. *R. v. Myddleton*, 6 T. R. 719.

and contriving and intending the liege subjects of our said lord the king to incite and move to hatred and dislike of the person of our said lord the king, and the government established within this realm, on, &c. with force and arms, at, &c. unlawfully, wickedly, maliciously, and seditiously, in the presence and hearing of divers liege subjects of our said lord the king, again did publish, utter, and declare of and concerning our said lord the king and his good, true, and faithful subjects, these words following, that is to say, "I (meaning the said A. B.) hope, king George the Third (meaning our said lord the king) will soon be no more; damnation to all royalists." (*Conclusion as before.*)

232. *Information for writing and publishing a libel against the king and government.*

That I. H. late of London, clerk, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said lord the king, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontent and sedition among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said majesty's subjects from his said majesty, and to insinuate, and cause it to be believed, that divers of his said majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his majesty's subjects in the said province, colony, or plantation to resist and oppose his majesty's government, on, &c. with (i) force and arms, at (k), &c. *wickedly maliciously* (l), and *seditiously* did write and publish (m), and cause and procure to be written and published, a certain

(i) This allegation is unnecessary, see 7 T. R. 4.

(k) As to this venue, see p. 28.

(l) As to this averment, see

p. 166. Str. 392. 1 Vin. Ab. 33.

(m) See Starkie's Law of Libel, p. 300. *Baldwin v. Elphinstone*, Bl. R. 1037.

false, (n), wicked, *malicious*, scandalous, and seditious libel (o), of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect (p) following;

"King's Arms-tavern, Cornhill, June 7, 1775.

"At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his majesty's (q)) troops at Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America,) on the nineteenth of last April", which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself the said I. H.) do pay to-morrow into the hands of Messrs. B. and C. on account of Dr. F. the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above-mentioned purpose. I. H."

(meaning himself the said I. H.) in contempt of our said lord the king, in open violation of the laws of this kingdom, and against the peace, &c.

(*Second count.*) That the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously devising, contriving, and intending as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper, entitled, "The Morning Chronicle and London Advertiser," a certain other false, wicked, scandalous, malicious, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and ef-

(n) This allegation need not be proved, see 7 T. R. 4.

(o) See p. 137. and Starkie on Libel, p. 324, &c.

(p) See p. 124, &c.

(q) As to the nature and use of innuendos, see p. 122, &c. and Starkie on Libel, p. 334, &c.

fect following, that is to say, (*setting out the libel as before.*)

Third and fourth counts for publishing the same in other newspapers.

(*Fifth count.*) Wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (*as before.*)

*Sixth count, for printing and publishing that part of the libel which precedes the *.*

(*Seventh count.*) And the said attorney-general of our said lord the king, for our said lord the king further gives the court here to understand and be informed, that the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously contriving, devising, and intending, as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, scandalous, malicious, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following: "I (meaning himself the said I. H.) think it proper to give the unknown contributor this notice, that I (again meaning himself the said I. H.) did yesterday pay to Messrs. B. and C. on the account of Dr. F. the sum of fifty pounds, and that I (again meaning himself the said I. H.) will write to Dr. F. requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said majesty's) troops at or near Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America,) on the nineteenth of last April. I. H. (again meaning himself the said I. H.) (*Conclusion as before (r).*)

(r) The original indictment, Cowp. 683. contains other counts stating the printing and publishing of the latter libel

in different newspapers, and also the publishing of both on different days.

233. *Indictment for writing and delivering a challenge at the instance of a third person.*

That A. B. late of, &c. esq. on, &c. at, &c. being of a turbulent, wicked, and malicious disposition, and intending to procure great bodily harm and mischief to be done to C. D. late of, &c. in the county aforesaid, esquire, and also intending, as much as in him the said A. B. lay, to incite and provoke the said C. D. unlawfully to fight a duel with and against one E. F. late of the same place, esquire, on the said second day of December, in the ——— year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously write, and cause to be written, a certain paper-writing, in the words, letters, and figures following, to wit, “To C. D. esquire, at B. (meaning the said C. D.) by the desire of Mr. E. F. (meaning the said E. F.) I (meaning himself the said A. B.) wait on you (meaning the said C. D.) to inform you (meaning the said C. D.) that he (meaning the said E. F.) expects such satisfaction as one gentleman should require from another, for an insult bestowed on him; your (meaning the said C. D.’s) conduct merits every treatment a scoundrel deserves. Manner, time, and place left to you (meaning the said C. D.) A. B. Dec. 2.” (meaning and intending by the said paper-writing a challenge to the said C. D. to fight a duel with and against the said E. F.) which said paper-writing (meaning and intending the same as such challenge as aforesaid) he the said A. B. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously, did deliver, and cause to be delivered, to the said C. D. against the peace, &c.

(*Second count, for delivering a written challenge as from, and on the part, and by the desire of E. F.*) That the said A. B. being such evil-disposed person and disturber of the peace of our said lord the king as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D. and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F. afterwards, to wit, on the same day and year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously deliver, and cause to be delivered, a certain

written challenge, as from, and on the part, and by the desire of the said E. F. to the said C. D. unlawfully to fight a duel with and against the said E. F. which said last-mentioned challenge is as follows, that is to say, (*set out the challenge,*) against the peace of our said lord the king, his crown and dignity.

(*Third count, for provoking and inciting the prosecutor to fight.*) That the said A. B. being such evil-disposed person, and disturber of the peace of our said lord the king as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D. and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F. afterwards, to wit, on the same day and year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously, provoke and incite the said C. D. (in the peace of God and our said lord the king then and there being,) unlawfully to fight a duel with and against the said E. F. against the peace, &c.

234. *Information for challenging and posting.*

That A. B. late of, &c. esquire, being a person of turbulent, wicked, and malicious disposition, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously intending, as much as in him lay, not only to terrify and affright one C. a good and peaceable subject of our said lord the king, but also to kill and murder him, heretofore, to wit, on, &c. with force and arms, at, &c. unlawfully and wickedly did provoke and challenge the said C. to fight and duel against him the said A. B. with sword and pistol; and the said _____ of our said lord the king, giveth the court here further to understand and be informed, that the said C, having then and there refused to fight with the said A. B. in pursuance of such wicked and unlawful challenge last aforesaid, he the said A. B. for the completing his aforesaid evil and wicked purpose and design, and further to provoke and incite the said C. to fight and duel against him the said A. B. in the manner aforesaid, afterwards, to wit, on the same day and year aforesaid, at C. aforesaid, in the county aforesaid, did wickedly and maliciously place, stick up and upon, and caused to be placed, stuck

up, and exposed to public view, to wit, on the market house in C. aforesaid, a certain paper writing, with the name of him the said A. B. thereunto subscribed, containing certain scurrilous and abusive matter against the said C. of the tenor following, that is to say, "Having received, (meaning thereby that the said A. B. had received,) a most ungentlemanlike affront from C. H. esquire, (meaning the said C.) I (meaning himself the said A. B. distinguish him (meaning the said C.) thus, that none may doubt the individual man of —, in the county of M. he (again meaning the said C.) having in the most cowardly manner refused to give me (meaning himself the said A. B.) the satisfaction due to a gentleman, I, (meaning himself the said A. B.) here in the sight and for the information of his countrymen, post him, (meaning the said C.) and declare him (again meaning the said C.) to be a dirty, cowardly, insolent fool, as such, I (meaning himself the said A. B.) will ever treat him, (meaning the said C.) A. B. of B. in the county of M." to the great damage and terror of him the said C. H. and against the peace of our said lord the king, his crown, and dignity.

235. *Indictment for drawing in effigy the collectors of the assessed taxes, in pursuance of a conspiracy.*

That A. B. late of, &c. labourer, C. D. late of the same place, labourer, &c. being respectively persons of evil, envious, and wicked minds, and of most malicious dispositions, and maliciously and unlawfully devising and intending to injure and aggrieve one E. F. gentleman, then and there being an officer and person engaged and employed in certain business relating to the revenue of our said lord the king, to wit, an inspector of the duties on horses and windows, and all other duties under the management of the commissioners for managing his majesty's affairs of taxes, by several acts granted to his majesty, and G. H. then and there being an officer and person engaged and employed in certain business relating to the revenue of our said lord the king, to wit, an officer for the survey and inspection of the several and respective rates and duties upon horses, windows, and lights, and upon inhabited houses, and upon male servants, carriages, horses, mules, and dogs, by certain acts of parliament granted to his majesty, and for viewing and

numbering the several lights or windows in each house, and inspecting and examining the assessment or certificate thereof, made or to be made according to the direction of certain acts of parliament, and for doing all other matters by the statutes in such case made and provided, requisite to be done by an officer of that nature, in the county of ———, being respectively, good, peaceable, and well disposed subjects of our said lord the king, and to bring them into great contempt, infamy, hatred, and disgrace, on, &c. with force and arms, at, &c. unlawfully and maliciously did conspire, combine, confederate, and agree among themselves, and together with divers other evil-disposed persons, whose names are unknown to the jurors aforesaid, to traduce, defame, vilify, and bring into public hatred, ridicule, and contempt, the said E. F. and G. H. as such officers as aforesaid, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c.; and that the said A. B. &c. in pursuance of and according to the conspiracy, combination, confederacy, and agreement as aforesaid before had, afterwards, to wit, on, &c. with force and arms, at, &c. unlawfully and maliciously did put and place, and cause and procure to be put and placed, two figures or effigies, the said effigies or figures being intended to represent the said E. F. and G. H. in a certain cart; and then and there unlawfully did, by and with a certain horse, draw, and cause to be drawn, the said cart with the said effigies so put and placed therein, and exposed to public sight and view, in, through, and along divers public streets and common highways there, and also before and near the dwelling-house of the said E. F. and dwelling-houses of divers liege subjects of our said lord the king there situate, and in the presence, sight, and view of divers liege subjects of our said lord the king, in the manner in which criminals are usually conveyed to the place of execution; and did then and there, during all that time, toll, and cause to be tolled, a certain large bell of and belonging to a certain church at ———, and made and caused to be made a great noise, riot, rout, and tumult, and disturbance, and utter, and cause to be uttered, divers malicious and opprobrious words and speeches, defaming and vilifying the said E. F. &c. and among others the opprobrious words and speeches following, that is to say, "Damn the dog taxers, (meaning, &c.) damn the window peepers (meaning, &c.)"; and beat, and

cause to be beaten, the heads and faces and other parts of the said effigies and figures, and did afterwards, to wit, on, &c. at, &c. cast and throw the said effigies or figures into a certain river or stream of water, to denote and represent the death and drowning of them the said, &c. and did then and there, immediately after such casting and throwing, ring, and cause to be rung, divers bells, in and belonging to a certain church, at, &c. in the manner in which the said bells were used to be rung on joyful occasions; and did afterwards, to wit, on, &c. at, &c. compose, write, and publish, and cause and procure to be composed, written, and published, a certain malicious and scandalous libel, containing, amongst other things therein, divers scandalous and malicious matters and things, of and concerning the said, &c. to the tenor and effect following, that is to say, "These two unfortunate malefactors, (meaning, &c.) were drawn to the place of execution, attended by that able priest, Jenny Wood; on their arrival, E. F. (meaning, &c.) stood up, and with uplifted hands addressed the spectators as follows,—'Fellow mortals, you have now presented to your view, one of the most unfortunate of men, (meaning, &c.) whose villainy has brought him to the most detestable of all deaths! I (meaning, &c.) have been the bane of social comfort to many; you now see the consequences of incorrigible roguery; I (meaning, &c.) have rid numbers of the golden dropsy which subsists near the purse, in order to add to my own disease; which will soon terminate my existence. To what dark abyss am I hastening! to unknown regions and pains yet unfelt by me! Ah! too late do I repent; the time is come I must answer to the call of justice; had I been just and true, half honest would have served me. I claim forgiveness of you, though I have wronged you all alike, with this my vile associate; (meaning, &c.) partner of my villainies,—sharer of my gains; words are wanting to convince you, how my conscience goads me; Heaven hath now poured down curses on my head.' N. B. This speech was answered by some pretty loud huzzas. The other miscreant, (meaning, &c.) then stood up, and with most beastly howl thus addressed the delighted spectators,—'Ungrateful wretches, you now behold a man (meaning, &c.) in the face of death, whose courage dares to call you by your proper titles. You say, I am of notorious ploughshare and buckle memory. Yes, I am

(meaning, &c.); my conduct as such commanded your esteem; I (meaning, &c.) took but 20s. and gave you two; but I am now foiled in my attempt, to strip you of all within your shallow purses. With an eternal chaos before my eyes, I tell you, we (meaning, &c.) have shared £1500; this I say, to gripe your empty pockets: Had we (meaning, &c.) lived, your persons should have been in pawn to glut our empty coffers. Now farewell, we shall meet anon, to compliment each other on our rogueries. I (meaning, &c.) bid you all farewell. This hardened villain's (meaning the said, &c.) speech was answered by much hissing and clapping of hands. They (meaning, &c.) were then drowned, drawn, quartered, and dissected; the joyful ceremony was finished by bell ringing, and the sudden transition of every one's countenance from that of a melancholy to a joyful aspect. Jemmy, the priest, endeavoured to convert them by sundry hard blows and divers bruises. Long live the king."—To the great scandal, infamy, and damage of the said, &c. to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

(*Second count.*) And the jurors aforesaid, on their oath aforesaid, do further present, that the said, &c. being respectively such persons as aforesaid, and maliciously and unlawfully devising and intending to injure and aggrieve the said, &c. then and there being respectively good, peaceable, and well-disposed subjects of our said lord the king, and to bring them into great contempt, infamy, hatred, and disgrace, on; &c. with force and arms, at, &c. unlawfully and maliciously did conspire, combine, confederate, and agree among themselves, and with divers other evil-disposed persons whose names are unknown to the jurors aforesaid, to traduce, defame, vilify, and bring into public hatred, ridicule and contempt, the said, &c. and the characters and conduct of them the said, &c. respectively, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c. aforesaid; and that the said C. D. &c. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, so as aforesaid had, afterwards, to wit, on, &c. with force and arms, at, &c. aforesaid, unlawfully and maliciously did put and place, and cause and procure to be put and placed, &c. (*as in first count.*)

(*Third count.*) Intending to injure the said, &c. as

such *officers* as aforesaid, &c. and to make and cause to be made, a great noise, &c. (*as before in first count*) unlawfully and maliciously did put and place, &c. (*as in the first count, but more generally, and omitting all the opprobrious words, except damn the dog taxers and window peepers*)

Fourth count,—same as third, except in the description of E. F. &c. as *officers*.

236. *Indictment for writing, sending, and publishing a libel.*

That A. B. late of O. schoolmaster, being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as much as in him lay; to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of C. D. widow, a good, peaceable, and worthy subject of our said lord the king, and to bring her into great contempt, ridicule, and disgrace, on, &c. with force and arms, at, &c. of his great hatred, malice, and ill-will towards the said C. D. wickedly, maliciously, and unlawfully, did write and cause to be written, a certain scandalous, malicious, and defamatory libel, of and concerning the said C. D. containing the false, scandalous, malicious, and defamatory words and matter following, that is to say, (*set out a copy, with proper innuendos to explain the meaning, if they be necessary,*) which said scandalous, malicious, and defamatory libel, he the said A. B. afterwards, to wit, on, &c. at, &c. wickedly, maliciously, and unlawfully did send, and cause to be sent, to the said C. D. in the form of a letter, directed to the said C. D. by the name of Mrs. C. D. at C. to the great damage, disgrace, scandal, and infamy of the said C. D. and against the peace, &c.

(*Second count.*) That the said A. B. being such envious, evil, wicked, and malicious person, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as aforesaid, to wit, on the same day and year aforesaid, with force and arms, at, &c. of his great hatred, malice, and ill-will towards the said C. D. wickedly, maliciously, and unlawfully, did write and publish to the said C. D. a certain other scandalous, malicious, and defamatory libel of and concerning the said C. D. containing very false, scandalous, malicious, and defamatory

words and matter following, that is to say, (*set out the libel as before.*)

Third count, for openly publishing.

237. *Indictment for exposing to sale and public view an obscene print.*

That A. B. late of, &c. bookseller, being a scandalous and evil-disposed person, and not having the fear of God in his heart, but devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said lord the king, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c. with force and arms, at, &c. in a certain open and public shop of him the said A. B. there situate, unlawfully, wickedly, maliciously, and scandalously, did publish, sell, and utter to one C. D. a liege subject of our said lord the king, a certain lewd, wicked, scandalous, infamous, and obscene print, on paper, entitled, "The Parson receiving Tithes in Kind," representing, &c. (*as in the print,*) and which said lewd, wicked, scandalous, infamous, and obscene print, on paper, was contained in a certain printed pamphlet, then and there uttered and sold by him the said A. B. to the said C. D. entitled, "the Covent Garden Magazine, or amorous Repository, calculated solely for the entertainment of the polite World," to the manifest corruption and subversion of youth, and other liege subjects of our said lord the king, in their manners and conversation, to the great scandal, infamy, and disgrace of all the clergy of this kingdom, in contempt of our said lord the king and his laws, and against the peace, &c.

In a *second count* allege the publication, omitting that it was contained in any pamphlet, &c.

238. *Indictment for an attempt to poison another.*

(*Commencement as in pr. 1.*) Wilfully, maliciously, and unlawfully, did mix deadly poison, to wit, one ounce of white arsenic with brandy, and the same poison mixed with brandy as aforesaid, afterwards, to wit, on the same day and year above mentioned, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously;

wilfully, maliciously, and unlawfully, did administer to, and cause the same to be taken by one C. D. then and there being a subject of our said lord the king; with intent; in so doing, feloniously, wilfully, and of his malice aforethought to poison, kill, and murder the said C. D., against the form of the statute, &c. (s) and against the peace, &c.

Add a count for administering the same, describing it as a noxious and destructive substance.

239. Indictment against the defendant for attempting to burn his own house.

That I. S. late of, &c. labourer, being a person of a wicked disposition, and unlawfully and maliciously devising, contriving, and intending feloniously to set fire to and burn and consume a certain house of one I. R. there situate, of which said house he the said I. S. was then, to wit, on the day and year hereafter mentioned, possessed for a term of years then and yet to come and unexpired, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the third, of, &c. with force and arms, at the parish aforesaid, in the county aforesaid, a certain lighted wax candle, which he the said I. S. had then lately before set fire to and lighted, did; unlawfully, wickedly, and maliciously, fix and put in a certain closet, under and adjoining certain wooden stairs, called the kitchen stairs, in the aforesaid house of the said I. R. which said house then was, and now is, situate and being in a certain neighbourhood and street there called New Bond Street, and contiguous and adjoining to certain dwelling-houses there, of and belonging to divers of the liege subjects of our said lord the king, and that he the said I. S. did then and there, unlawfully, wickedly, and maliciously, put and place about, unto, and against the said lighted candle, so fixed and put by him the said I. S. in the said closet as aforesaid, divers matches and small pieces of wood, and other combustible materials, with a wicked and malicious intention, by means thereof, then and there *feloniously* to set fire to the aforesaid house of the aforesaid I. R. and to burn and consume the same, to the great damage of the said I. R. to the great damage, terror, and affrightment

(s) Under the stat. 43 G. 3.c. 58. See p. 580; note (i), and the Pr. p. 585.

of all the liege subjects of our said lord the king near the said house then and there inhabiting and dwelling, and against the peace, &c. (1)

(*Second count.*) That the said I. S. being such person as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. a certain wax candle, which he the said I. S. had then lately before set fire to and lighted, did unlawfully, wickedly, and maliciously, fix and put up in a certain closet, under and adjoining to certain wooden stairs, called the kitchen stairs, in the dwelling house of him the said I. S. there situate, which said dwelling-house then was and now is situate and being in a certain neighbourhood and street there called New Bond Street, and contiguous and adjoining to certain dwelling-houses then and there belonging to divers of the liege subjects of our said lord the king, and that the said I. S. did then and there unlawfully, wickedly, and maliciously, put and place about, unto, and against the said last-mentioned lighted candle, so fixed and put by him the said I. S. in the said last-mentioned closet, as aforesaid, divers matches and small pieces of wood, and other combustible materials, with a wicked and malicious intention, by means thereof then and there feloniously to set fire to the aforesaid dwelling-house of him the said I. S. and to burn and consume the same, to the great danger, terror, and affrightment of all the liege subjects of our said lord the king, near the said dwelling-house of him the said I. S. then and there inhabiting and dwelling, and against the peace, &c.

(*Third count.*) Certain matches and small pieces of wood, then and there being in a certain other house of the said I. D. there situate, to wit, under certain wooden stairs in the same house, did unlawfully, wickedly, and maliciously set fire to the said last-mentioned house, then and now being and situate, &c. in a certain neighbourhood, and street there, called New Bond Street, and contiguous and adjoining to certain dwelling houses thereof, and belonging to divers of the liege subjects of our said lord the king; with a wicked and malicious intention, by means thereof, then and there feloniously to set fire to the aforesaid last-mentioned house of the said

(1) *R. v. Scofield*. Cald. 397. used in Scofield's case, which See the objection which was was before the stat. 43 G. 31 urged against this indictment, c. 58. vide supra. p. 440. p. 181. This indictment was

wilfully, maliciously, and unlawfully, did administer to, and cause the same to be taken by one C. D. then and there being a subject of our said lord the king, with intent, in so doing, feloniously, wilfully, and of his malice aforethought to poison, kill, and murder the said C. D., against the form of the statute, &c. (s) and against the peace, &c.

Add a count for administering the same, describing it as a noxious and destructive substance.

239. Indictment against the defendant for attempting to burn his own house.

That I. S. late of, &c. labourer, being a person of a wicked disposition, and unlawfully and maliciously devising, contriving, and intending feloniously to set fire to and burn and consume a certain house of one I. R. there situate, of which said house he the said I. S. was then, to wit, on the day and year hereafter mentioned, possessed for a term of years then and yet to come and unexpired, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the third, of, &c. with force and arms, at the parish aforesaid, in the county aforesaid, a certain lighted wax candle, which he the said I. S. had then lately before set fire to and lighted, did; unlawfully, wickedly, and maliciously, fix and put in a certain closet, under and adjoining certain wooden stairs, called the kitchen stairs, in the aforesaid house of the said I. R. which said house then was, and now is, situate and being in a certain neighbourhood and street there called New Bond Street, and contiguous and adjoining to certain dwelling-houses there, of and belonging to divers of the liege subjects of our said lord the king, and that he the said I. S. did then and there, unlawfully, wickedly, and maliciously, put and place about, unto, and against the said lighted candle, so fixed and put by him the said I. S. in the said closet as aforesaid, divers matches and small pieces of wood, and other combustible materials, with a wicked and malicious intention, by means thereof, then and there *feloniously* to set fire to the aforesaid house of the aforesaid I. R. and to burn and consume the same, to the great damage of the said I. R. to the great damage, terror, and affrightment

(s) Under the stat. 43 G. 3.c. 58. See p. 580; note (r), and the Pr. p. 585.

of all the liege subjects of our said lord the king near the said house then and there inhabiting and dwelling, and against the peace, &c. (1)

(*Second count.*) That the said I. S. being such person as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. a certain wax candle, which he the said I. S. had then lately before set fire to and lighted, did unlawfully, wickedly, and maliciously, fix and put up in a certain closet, under and adjoining to certain wooden stairs, called the kitchen stairs, in the dwelling house of him the said I. S. there situate, which said dwelling-house then was and now is situate and being in a certain neighbourhood and street there called New Bond Street, and contiguous and adjoining to certain dwelling-houses then and there belonging to divers of the liege subjects of our said lord the king, and that the said I. S. did then and there unlawfully, wickedly, and maliciously, put and place about, unto, and against the said last-mentioned lighted candle, so fixed and put by him the said I. S. in the said last-mentioned closet, as aforesaid, divers matches and small pieces of wood, and other combustible materials, with a wicked and malicious intention, by means thereof then and there feloniously to set fire to the aforesaid dwelling-house of him the said I. S. and to burn and consume the same, to the great danger, terror, and affrightment of all the liege subjects of our said lord the king, near the said dwelling-house of him the said I. S. then and there inhabiting and dwelling, and against the peace, &c.

(*Third count.*) Certain matches and small pieces of wood, then and there being in a certain other house of the said I. D. there situate, to wit, under certain wooden stairs in the same house, did unlawfully, wickedly, and maliciously set fire to the said last-mentioned house, then and now being and situate, &c. in a certain neighbourhood, and street there, called New Bond Street, and contiguous and adjoining to certain dwelling houses thereof, and belonging to divers of the liege subjects of our said lord the king; with a wicked and malicious intention, by means thereof, then and there feloniously to set fire to the aforesaid last-mentioned house of the said

(1) *R. v. Scofield*. Cald. 397. used in Scofield's case, which See the objection which was was before the stat. 43 G. 3: urged against this indictment, c. 58. vide supra. p. 440. p. 181. This indictment was

I. R. and to the damage, terror, and affrightment of all the liege subjects of our lord the king, near the said last-mentioned house then and there inhabiting and dwelling, against the peace, &c.

(*Fourth count.*) Certain matches and small pieces of wood, then and there being in the dwelling-house of him the said I. S. to wit, under certain wooden stairs in the said dwelling-house, did unlawfully, wickedly, and maliciously set fire to the said last-mentioned dwelling-house, then and now being situate, &c. (*as in the last.*)

(*Fifth count.*) A certain other house of the said I. R. there situate, and also situate and being in a certain neighbourhood and street there, called New Bond Street, and contiguous and adjoining to certain dwelling-houses there, of and belonging to divers of the liege subjects of our said lord the king, did unlawfully, wickedly, and maliciously attempt then and there feloniously to set fire to and burn and consume, to the great damage, &c. (*as before.*)

(*Sixth count.*) A certain other dwelling-house of him the said I. S. there situate, and also situate and being in a certain neighbourhood and street there, called New Bond Street, and contiguous and adjoining to certain dwelling-houses thereof, and belonging to divers liege subjects of our said lord the king, did unlawfully, wickedly, and maliciously, attempt then and there feloniously to set fire to and burn and consume, to the great danger, terror, and affrightment of all the liege subjects of our said lord the king, near the last-mentioned dwelling-house of him the said I. S. then and there inhabiting and dwelling, against the peace, &c. (*u*).

240. *Indictment for soliciting a person to steal his master's goods (x).*

(*Commencement as in pr. 1.*) Did falsely, wickedly, and unlawfully solicit and incite one J. D. a servant of one J. P. of, &c. to take, embezzle, and steal a large quantity, to wit, 100 pounds weight of twist, of the value of — of the goods and chattels of his master, the said J. P. to the great damage of the said J. P. and against the peace, &c.

(*u*) *R. v. Scofield*, Cald. 397.

(*x*) *R. v. Higgins*, 2 East, 4. the defendant was convicted at the quarter sessions upon this indictment, and sentenced to

the pillory and two years imprisonment; the Court of King's Bench afterwards affirmed the judgment upon a writ of error, see p. 145.

OFFENCES AGAINST THE PUBLIC PEACE.

241. *Indictment for a riot.*

(*As in pr. 57, to the *.*) To disturb the peace of our said lord the king, and then and there being so assembled and gathered together, did then and there* make a great noise, riot, tumult, and disturbance, and then and there unlawfully, riotously, routously, and tumultuously remained and continued together, making such noise, riot, tumult, and disturbance, for a long space of time, to wit, for the space of six hours and more then next following, to the great terror and disturbance, not only of the liege subjects of our said lord the king there and thereabouts inhabiting, residing, and being, but of all the other liege subjects of our said lord the king there passing and repassing in and along the public streets and king's common highways there*, in contempt of our said lord the king and his laws, and against the peace, &c.

242. *Indictment for a riot and assault.*

(*As in the last count to the *, and then allege,*) in and upon one M. N. then and there being, unlawfully, riotously, and routously, did make an assault, and him the said M. N. then and there unlawfully, riotously, and routously, did beat, wound, and ill-treat, so that his life was greatly despaired of, and other wrongs to the said M. N. then and there unlawfully, riotously, and routously, did, to the great damage of the said M. N. and against the peace, &c.

243. *Indictment for a riot, and endeavouring to rescue two persons apprehended for attempting to cut down a turnpike gate,*

(*Commence as in pr. 57 to the *.*) And being then and there so assembled and gathered together, armed with axes, hatchets, and other instruments, with an intent to cut down and destroy, and then and there did attempt to

cut down and destroy, a certain turnpike-gate, then and there lately before, to wit, on, &c. erected by authority of a certain act of parliament in that case made and provided, entitled, "An act" (*the title of the act,*) and that the said I. B. and C. D. afterwards, to wit, on the same day and year first above mentioned, at L. aforesaid, in the county aforesaid, were lawfully taken and apprehended for the offences aforesaid, and then and there were conveyed before I. S. esquire, then being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county of H. aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county, to be examined touching the premises, and further to be dealt with according to law, and were duly kept and detained in custody at the dwelling-house of the said I. S. situate in L. aforesaid, for that purpose; and that the said I. B. and C. D. so being in custody for the offences aforesaid, he the said A. B. afterwards, to wit, on the same day and year first above mentioned, at L. aforesaid, in the county aforesaid, together with the said other persons (to the jurors aforesaid as yet unknown,) the dwelling-house of the said I. S. there situate, unlawfully, riotously, and routously, did attack and beset; and that he the said A. B. did then and there advise, persuade, and encourage the said other persons (to the jurors aforesaid as yet unknown) to discharge and shoot off several guns to and against the said dwelling-house of the said I. S. and by such advice, persuasion, and encouragement of the said A. B. the said other persons (to the jurors aforesaid as yet unknown) then and there did discharge and shoot off several guns against the said dwelling-house of the said I. S. with an intent forcibly to rescue the said I. B. and C. D. so as aforesaid being in custody for the causes before mentioned. (*Conclude as in pr. 234. from the *.*)

244. *Indictment upon the riot act for a riot, &c. (a)*

(*Commencement as in pr. 57. to the *.*) To disturb the peace of our said lord the king; and that afterwards,

(a) By stat. 1 Geo. 1. stat. 2. c. 5. s. 1. it is enacted, "that if any persons, to the number of twelve or more, being unlaw-

to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, T. D. esquire, then being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county of Middlesex aforesaid, and also to hear and determine divers felonies, trespasses, and other misde-

fully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord one thousand seven hundred and fifteen, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his undersheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form herein-after directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request, made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, &c."

By s. 2. any justice, &c. (*as before*) shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be

commanded, silence to be, while proclamation is making, and after that, shall openly, and with a loud voice, make or cause to be made proclamation in these words, or like in effect: "Our sovereign, &c." (*as set forth in the indictment in the next page.*)

s. 3. Those assembled, and not dispersing within an hour, may be seized, &c. and if they make resistance, the persons killing them, &c. shall be indemnified.

Opposing, &c. the making of such proclamation, felony without benefit, &c. and if the proclamation be obstructed, rioters shall nevertheless suffer as felons, s. 5.

s. 4. If any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, &c. or any dwelling-house, barn, stable, or other outhouse, they shall suffer death without benefit, &c.

s. 6. Parties injured by such demolishing or pulling down, either wholly or in part, shall recover their damages against the hundred, &c.

Extended to mills, and the works thereto belonging, by Geo. 3. c. 29. s. 4.

meanors committed in the same county, did then and there come as near as he safely could to the said A. B., C. D., E. F., G. H., and the said divers other persons, to the number of twelve or more (to the jurors aforesaid as yet unknown,) being then and there so assembled, to the disturbance of the public peace, as aforesaid, and with a loud voice, he the said T. D. did then and there command, and cause to be commanded, silence to be, while proclamation was making; and the said T. D. after that, did then and there openly, and with a loud voice, make proclamation (according to the form of the statute in such case made and provided,) in these words following, that is to say, "Our sovereign lord the king chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act, made in the first year of King George, for preventing tumults and riotous assemblies. God save the king." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., C. D., E. F., G. H., and the said divers other persons, to the number of twelve and more (to the jurors aforesaid as yet unknown), afterwards, to wit, on the said _____ day of March, in the said _____ year of the reign of our said lord the now king, with force and arms, at the parish aforesaid, in the county aforesaid (notwithstanding the said proclamation was so openly made as aforesaid), did then and there unlawfully, feloniously, riotously, and tumultuously to the disturbance of the public peace, remain and continue together by the space of one hour after such command made by the proclamation so as aforesaid, against the form of the statute, &c. and against the peace, &c.

245. *Information for a riot committed in open court, upon a special commission.*

(Commence as in pr. 7.) That on, &c. at, &c. a special session of oyer and terminer and gaol delivery was holden, by adjournment, in and for the county of Kent, at Maidstone, in the said county, before Sir F. B. bart. one of the justices of our said lord the king of his Court of C. P. J. H. esq. another of the justices of our said lord the king of his Court of C. P. Sir S. L. knt. one of the justices of our said lord the king, assigned to hold pleas

before the king himself, S. S. esq. one of the serjeants of our said lord the king, learned in the law, and others their fellows, justices and commissioners of our said lord the king, assigned, by letters patent of our said lord the king under the great seal of Great Britain, to inquire, by the oath of good and lawful men of the said county of Kent, of all high treasons and misprisions of high treason, other than such as relate to the coin of our said lord the king, within the county aforesaid done, committed, or perpetrated, and the said treasons and misprisions of treason, according to the laws and customs of England, for that time to hear and determine; and also assigned and constituted, by the letters patent of our said lord the king under the great seal of Great Britain, to deliver the gaol of our said lord the king of Kent, of the prisoners therein being and detained, on the 8th day of March, in the 38th year aforesaid, or who should be therein detained before the 10th day of April, in the same year, for and on account of any high treasons or misprisions of high treasons, other than such as relate to the coin of our said lord the king; at which said sessions, so then and there holden as aforesaid, before the commissioners and justices above named, and others their fellows as aforesaid, came A. C. esq. in the custody of I. P. esq. sheriff of the said county of Kent, and which said A. C. was and had been detained in the gaol of our said lord the king of the said county of Kent, before the 10th day of April, in the year aforesaid, to wit, on the 7th day of April, in the year aforesaid, for and on account of high treason, to wit, at Maidstone aforesaid; and the said A. C. being then and there, to wit, at the said session so holden as aforesaid, brought to the bar in his own proper person, was then and there committed by the justices and commissioners above named, and others their fellows aforesaid, to the custody of the said sheriff, and so being in the custody of the said sheriff, was then and there, at the said sessions so holden as aforesaid, tried by the jurors of a certain jury of the said county of Kent, in that behalf duly impannelled, returned, and chosen, tried, and sworn, for and upon certain high treasons, not relating to the coin of our said lord the king, specified and charged upon him in and by a certain indictment theretofore, to wit, at a previous holding of the same sessions before the said Sir F. B., J. H., and others their fellows,

justices and commissioners assigned as aforesaid, duly found, returned, and presented against him, by the jurors of a certain other jury of the said county of Kent, duly sworn and charged to inquire for our said lord the king for the body of the said county, to which said indictment he had theretofore pleaded that he was not guilty of the premises therein specified and charged upon him; and the said A. C. so being in the custody of the said sheriff as aforesaid, was then and there, at the same session by the jurors by whom he was so tried as aforesaid, found not guilty of the premises in and by the said indictment specified and charged upon him, as by the record and proceedings thereof more fully appears. And the said attorney-general, &c. further, &c. that the Right Honourable A. B. Earl of C. late of M. in the county of Kent, E. F. late of the same place, barrister at law, &c. well knowing the premises aforesaid, but unlawfully and maliciously devising and intending to impede the course of public justice, and to break the peace of our said lord the king, and to interrupt and disturb the justices and commissioners of our said lord the king above named, and others their fellows aforesaid, in the execution of their said office, and to prevent and hinder the due and peaceable holding of the said session, did, together with divers other riotous and ill-disposed persons, whose names are to the said attorney-general as yet unknown, in open court at the said session so then and there holden, and at which the said trial was so had as aforesaid, to wit, at Maidstone aforesaid, in the presence of the justices and commissioners of our said lord the king above named, and others their fellows as aforesaid, and before any order or direction had been made or given by the said justices or commissioners above named, and others their fellows as aforesaid, or any or either of them, for the discharge of the said A. C. from the custody of the said sheriff, and before the said A. C. was discharged from the custody of the said sheriff, to wit, on the — day of — in the 38th year aforesaid, at Maidstone aforesaid, in the county of Kent, with force and arms, made, and caused to be made, a very great riot, rout, tumult, and disturbance, and with force of arms riotously, routously, and tumultuously attempted and endeavoured to rescue the said A. C. from and out of the custody of the said sheriff, so that he the said A. C. might go at large wheresoever he

would, and also aid and assist the said A. C. in an attempt by him then and there made to rescue himself and escape and go at large from and out of the custody of the said sheriff, and the better to effect such rescue and escape, did then and there, at the said session so holden, and at which the said trial was so had as aforesaid, to wit, on, &c. at, &c. in the open court aforesaid, in the presence aforesaid, with force and arms, and with sticks, staves, and fists, unlawfully, riotously, routously, and tumultuously make an assault in and upon one *Frederick Rivett*, one *Edward Fugion*, and one *Thomas Adams*, in the peace of God and our said lord the king then and there being, and them the said, &c. did then and there beat, bruise, wound, and ill-treat, and thereby then and there, with force and arms, did unlawfully, riotously, routously, and tumultuously impede and obstruct the justices and commissioners of our said lord the king above named, and others their fellows aforesaid, in the due and lawful holding of the same session and the execution of their office, for a long space of time, to wit, for the space of one hour, to the damage of the said John Rivett, &c. to the great contempt, disturbance, and interruption of the justices and commissioners above named, and others their fellows aforesaid, to the great terror of all the liege and peaceable subjects of our said lord the king there being, in contempt of our said lord the king and his laws, and against the peace, &c.

(*Second Count.*) That the said A. B. Earl of C. &c. well knowing all the premises aforesaid, but unlawfully and maliciously devising and intending to impede the course of public justice, and to rescue, and cause to be rescued, the said A. C. so being in the custody of the said sheriff as aforesaid, from the custody of the said sheriff, so that he the said A. C. might go at large whithersoever he would, did afterwards, to wit, at the same session so then and there holden, and at which the said trial was so held as aforesaid, before any order or direction had been made or given by the justices and commissioners of our said lord the king above named, and others their fellows aforesaid, or any or either of them, for the discharge of the said A. C. from the custody of the said sheriff, to wit, on, &c. at, &c. with force and arms, aid and assist the said A. C. in a certain other attempt by him then and there made to rescue himself and escape and go at large from and out of the custody of the said sheriff,

and the better to effect such rescue and escape as last aforesaid, did then and there, with force and arms, and with sticks, staves, and fists, unlawfully make a certain other assault in and upon the said T. A. in the peace of God and our said lord the king then and there being, and in the aid of the said sheriff then and there also being, and him the said T. A. did then and there again beat, bruise, and ill-treat, to the great damage of the said T. A. to the great contempt, &c. (*Conclusion as before.*)

(*Third Count.*) That at the said session so holden, and at which the said trial was so had as aforesaid, to wit, at —————, the said A. B. Earl of C. and E. F. unlawfully and maliciously devising and intending to break the peace of our said lord the king, and to interrupt and disturb the justices and commissioners of our said lord the king above named, and others their fellows aforesaid, in the execution of their office, and to prevent and hinder the due and peaceable holding of the said session, did, together with divers other ill-disposed persons, whose names are to the said attorney-general as yet unknown, at Maidstone aforesaid, in the open court aforesaid, and in the presence of the justices and commissioners above named, and others their fellows aforesaid, to wit, on, &c. unlawfully, riotously, routously, and tumultuously assemble and gather themselves together to break the peace of our said lord the king, and to interrupt, disturb, and obstruct the justices and commissioners above named, and others their fellows aforesaid, in the execution of their office, and to prevent and hinder the due and peaceable holding of the said session, and being so assembled and gathered together, did then and there, with force and arms, at the said session so then and there holden, and at which the said trial was so had as aforesaid, in the open court aforesaid, and in the presence aforesaid, with force and arms, unlawfully, riotously, routously, and tumultuously make and raise, and cause and procure to be made and raised, another very great noise, tumult, riot, and disturbance, and thereby for a long space of time, to wit, for the space of half an hour, interrupt, disturb, and obstruct the justices and commissioners above named, and others their fellows aforesaid, in the lawful and peaceable holding of the said session, and in and upon the said John Rivett, &c. in the peace of God and of our said lord the king then and there being, with force and arms, &c. did then and there make another assault, and them the said

John Rivett, &c. did again beat, bruise, wound, and otherwise ill-treat, to the great damage of the said John Rivett, &c. to the great hindrance of public justice, to the manifest disturbance and violation of the peace of our said lord the king, to the great hindrance, obstruction, and contempt of the justices and commissioners above named, and others their fellows aforesaid, to the great terror of all the liege and peaceable subjects of our said lord the king there being, in contempt of our said lord the king and his laws, &c. and against the peace, &c.

(Fourth count.) That at a certain other special session of oyer and terminer and gaol delivery, holden, by adjournment, in and for the county of Kent, at Maidstone, in the said county, before, &c. and others their fellows, justices and commissioners of our said lord the king, by our said lord the king duly assigned and constituted to hold the same session, the said A. B. Earl of C. and E. F. unlawfully and maliciously devising and intending to break the peace of our said lord the king, and to prevent and hinder the due and peaceable holding of the said last-mentioned session, did, together with divers other ill-disposed persons, whose names are to the said attorney-general as yet unknown, in open court, at and during the continuance of the said last-mentioned session, and in the presence of the justices and commissioners last above named, and others their fellows aforesaid, to wit, on, &c. at, &c. unlawfully, riotously, routously, and tumultuously assemble and gather themselves together, to break the peace of our said lord the king, and to prevent and hinder the due and peaceable holding of the said last-mentioned session, and being so assembled and gathered together, did then and there, with force and arms, at the said last-mentioned session, in the open court last aforesaid, in the presence last aforesaid, unlawfully, riotously, routously, and tumultuously make and raise, and cause and procure to be made and raised, another very great noise, riot, rout, tumult, and disturbance, and thereby for a long space of time, to wit, for the space of half an hour, interrupt, disturb, and obstruct the justices and commissioners last above named, and others their fellows last aforesaid, in the lawful and peaceable holding of the said last-mentioned session, to the great hindrance of public justice, &c. *(as in the last count.)*

Fifth count, generally for a riot.

246. *For thisbehaviour at church.*

On, &c. being Sunday, with force and arms, at, &c. in the parish church there, during the celebration of divine service, the bench of one A. J. widow, there being, from its ancient and proper place unlawfully and unjustly did take and remove, and also, then and there, with force and arms, unlawfully, unjustly, and irreverently, did disturb and hinder one E. R. clerk, then being curate of the parish church aforesaid, and in the execution of his office; and in the reading of divine service, against the peace, &c.

247. *Indictment on 1 Geo. 1. c. 5. for a riot, and beginning to pull down a dwelling-house (b).*

(Commencement as in pr. 57. to the *.) To the disturbance of the public peace, and being then and there so assembled together, then and there unlawfully and with force, feloniously did begin to demolish and pull down the dwelling-house of one I. M. situate in the said parish of S. P. in the county aforesaid, against the form, &c. and against the peace, &c.

248. *Indictment for riot and assault in a dissenting meeting house.*

(Commencement as in pr. 57. to the *.) To disturb the peace of our said lord the king, and being so assembled together, did then and there unlawfully, riotously, routously, and tumultuously, disturb several of the liege subjects of our said lord the king, peaceably assembled and met together for the purpose of hearing divine service, in a certain dissenting meeting-house there situate, by riotously and routously shouting, hallooing, and making a great noise, whereby the said divine service was greatly interrupted; and that the said M. S. &c. one J. L. who was then and there attending the said divine service, in the said meeting-house, and in the peace of God and our said lord the king then and there being, unlawfully and riotously, did beat, wound, and ill-treat, so that his life was

(b) See p. 642. n. (a).

greatly despaired of, to the great disturbance of, and terror of, divers of his majesty's subjects, to the great damage of the said I. L. and against the peace, &c.

Second count, for a common assault.

249. *Indictment upon the stat. exempting protestant dissenters from the church of England from the penalties of certain laws (c).*

The jurors of our lord the king, upon their oath, present that A. B. late of, &c. C. D. late of, &c. and E. F. late of, &c. being disorderly and ill-disposed persons, on, &c. the same being the Lord's day, commonly called Sunday, with force and arms, unlawfully, willingly, and of purpose, maliciously and contemptuously came into a congregation of protestant dissenters, being subjects of our said lord the present king, then lawfully assembled and met for religious worship, in the dwelling-house of I. M. in the said parish of B. aforesaid, the same congregation then and there being a congregation for religious worship, permitted and allowed by a certain act of parliament, made and passed in the first year of the reign of their late majesties King William and Queen Mary, entitled, "An Act for exempting their Majesties' Protestant Subjects dissenting from the Church of England, from the Penalties of certain Laws;" and the said place of the said meeting of the said congregation, then and there being duly certified and registered according to the said act, and did then and there unlawfully, wilfully, and of purpose, maliciously and contemptuously disquiet and disturb the same congregation then and there assembled and met as aforesaid, against the form of the statute, &c. and against the peace, &c.

(*Second count.*) That the said A. B., C. D., and E. F., being such disorderly and ill-disposed persons as aforesaid, on, &c. the same day being the Lord's day, commonly called Sunday, with force and arms, unlawfully, willingly, and of purpose, maliciously and contemptuously did enter and come into a certain room or passage of the dwelling-house of the said I. M. adjoining to a certain other room in the said dwelling-house, in which last-mentioned room a certain congregation of protestant

dissenters, subjects of our said lord the present king, were then and there lawfully assembled and met for religious worship, the same congregation then and there being a congregation for religious worship, permitted and allowed by a certain act of parliament made and passed in the said first year of the reign of our said late majesties King William and Queen Mary, entitled, "An Act," &c. and the said place of the said meeting of the said congregation, then and there being duly certified and registered according to the said act, did then and there unlawfully, willingly, and of purpose, and maliciously, irreverently, and contemptuously, make divers great cries, noises, and disturbances, to disturb and disquiet, and did then and there disquiet and disturb the same congregation so then and there assembled and met as aforesaid; against the form; &c. and against the peace, &c.

OFFENCES RELATING TO TRADE AND THE PRICE OF PROVISIONS, &c.

250. *For unlawfully putting on board implements used in manufacturing (g.)*

Unlawfully did load and put on board, and did cause and procure to be loaden and put on board, of a certain ship or vessel, then being at Liverpool aforesaid, called the Hercules, which was not bound directly to any port or place in Great Britain or Ireland, *certain implements, proper for the working up of the cotton manufactures of this kingdom, to wit, 100 comb plates, 100 docking plates, 1000 reed wires, 1000 dents, one roving or winding jack and flier, two plyers, and two card stretchers*, in contempt of our said lord the king and his laws, against the peace of our said lord the king, his crown and dignity, and against the form, &c.

(*Second count.*) Unlawfully did load and put on

(g) *R. v. Orrel*, Lanc. Lent Ass. 1814. See the stat. 14 G. 3: c. 71. The defendant was convicted on the first four counts.

board a certain ship or vessel then being at Liverpool aforesaid called the Hercules, which was not bound directly to any port or place in Great Britain or Ireland, divers, to wit, 100 comb plates, &c. (as before) being PARTS of certain machines proper for the working up of the cotton manufactures of this kingdom. (Conclusion as before.)

Third count—describing the articles as being parts of a certain machine or engine called a loom, proper for the working of the cotton manufactures of this kingdom.

(*Fourth count.*) And the jurors, &c. (as before.)

(*Fifth count.*) Unlawfully had in his possession certain implements proper for the working of the cotton manufactures of this kingdom, to wit, (set out the implements) with intent to export the same to some other port or place than Great Britain or Ireland, to wit, New York, in America. (Conclusion as before.)

251. *For preparing to go abroad and use the trade of a comb-maker.*

That T. L. late of (h) Liverpool, &c. comb-maker, being a subject of our said lord the king, and an artificer and manufacturer of Great Britain, to wit, a comb-manufacturer, and not regarding the laws and statutes of this realm, on, &c. with force and arms, at Liverpool aforesaid, in the county aforesaid, was unlawfully preparing to go abroad beyond the seas, out of his majesty's dominions, into a foreign country, to wit, America, out of his majesty's dominions, for the purpose of there using and exercising his said trade and manufacture, against the form, &c. and against the peace, &c.

Second count states the like offence of preparing to go to America, for the purpose of there teaching his said trade and manufacture to foreigners.

252. *Indictment at common law for forestalling (i).*

Middlesex. Did buy and cause to be bought of and from one T. H. three hundred pounds weight of cheese,

(h) *R. v. Lister*, Lancast. M. Ass. 1813. See the stat. 5 G. 1. c. 27. s. 4.

(i) See the stat. 12 G. 3. c. 71. which repeals the several statutes enacted against this of-

for the sum of three pounds fifteen shillings and sixpence of lawful money, as he the said T. H. then and there was coming towards London, to wit, to a certain market called Leadenhall Market, in London aforesaid, to sell the said three hundred pounds weight of cheese, and before the same was brought into the said market, where the same should be sold, in contempt of our said lord the king and his laws, and against the peace, &c.

253. *Against a regrator.*

That A. B. late of, &c. yeoman, on, &c. at, &c. to wit, in a certain market there, called B. Market, did obtain, and get into his hands and possession ten geese, thirty ducks, and eighteen drakes, of and from one E. C. for the sum of four pounds and nine shillings, of lawful money of Great Britain, (the said geese, ducks, and drakes, then being brought to the said market by the said E. C. to be sold); and afterwards, to wit, on the same first day of March, in the year aforesaid, he the said A. B. at the parish aforesaid, in the county aforesaid, in the said market there, called B. market, unlawfully did regrate the said geese, ducks, and drakes, and sell the same again to one W. S. for the sum of five pounds. (*Conclude as in the last.*)

fence. But at common law all endeavours to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such-like devices, are highly criminal, and punished by fine and imprisonment. 1 Haw. 234. 235. 6th ed. 479.

By the common law, a merchant bringing victuals into the realm may sell the same in gross; but no person can law-

fully buy within the realm any merchandize in gross, and sell the same in gross again, without being liable to be indicted for the same. *Ib.*

And the bare engrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the engrosser or not. *Ib.*

And so jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf, perhaps for this reason, because by such means the market is in effect forestalled. *Ibid.*

254. *Against an engrosser.*

That A. B. late of, &c. yeoman, on, &c. at, &c. did unlawfully engross and get into his hands, by buying of and from one R. G. fifty quarters of wheat, to the intent to sell the same again at an unreasonable profit. (*Conclusion as before.*)

255. *For spreading rumours with intent to raise the price of hops (k).*

(*Commencement as in pr. 1.*) Wickedly intending to enhance the price of hops, did spread divers *false (l)* rumours and reports with respect to hops, by then and there openly and wickedly, in the presence and hearing of divers hop-planters and dealers in hops and others then being at W. declaring and publishing, that the then present stock of hops was nearly exhausted, and that from that time there soon would be a scarcity of hops; and that before the hops then growing could be brought to market, the then present stock of hops would be exhausted; with intent and design, by such rumours and reports, to induce divers persons unknown then present, being dealers in hops, and accustomed to sell hops, and having large quantities of hops for sale, not to carry or send to any market or fair any hops for sale, and to abstain from selling such hops for a long time, and thereby generally to enhance the price of hops, in contempt, &c. and against the peace, &c.

(*Second count.*) Wickedly intending to enhance the price of hops, did openly publish and spread divers false rumours and reports with respect to hops, to the effect following, to wit, that the then present stock of hops was nearly exhausted, and that there would soon be a scarcity of hops; and that before the hops then growing could be brought to market, the then present stock of hops would be exhausted, with intent, by such rumours and reports as aforesaid, to enhance the price of hops, in contempt, &c.

(k) *R. v. Waddington*, 1 East, 143.

(l) This word was not in the original indictment.

(*Third count.*) Unlawfully engrossed and got into his hands, by buying, a certain large quantity of hops, to wit, 100 pockets of hops, of one W. G. (*and so on of other persons, naming them,*) at certain large prices, to wit, 15l. for each hundred weight, with intent to resell the same at an unreasonable profit, and thereby to enhance the price of hops, against the peace, &c.

(*Fourth count.*) Unlawfully engrossed and got into his hands a certain large quantity, to wit, 3700 pockets of hops, by contracting with G. W. &c. (*naming the persons,*) to buy and take of them the same, by then and there persuading them to sell and deliver to him the said last-mentioned quantity of hops, at certain large prices, to wit, 13l. for every hundred weight which should be delivered to him on, &c. then next following, 14l. for every hundred weight delivered to him on, &c. and 15l. for every hundred weight delivered to him on, &c. with intent to resell the said hops at an unreasonable profit, and thereby greatly to enhance the price of hops (*m*).

OFFENCES AGAINST PUBLIC HEALTH AND CONVENIENCE.

256. *For supplying unwholesome bread.*

That A. B. late of, &c. on, &c. at, &c. knowingly, wilfully, deceitfully, and maliciously, did provide, furnish, and deliver, to and for 800 French prisoners of war, whose names to the said jurors are yet unknown, and there being under the protection of the king, confined in a certain hospital called Eastwood Hospital, in the parish and county aforesaid, divers large quantities, to wit, 500lb. weight of bread, to be eaten as food by the said French prisoners of war; such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of and con-

(*m*) There were several other counts in the original indictment, charging the offence more generally.

taining dirt, filth, and other pernicious and unwholesome ingredients (*a*), not fit to be eaten by man, he the said A. B. then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of and to contain dirt, filth, and other pernicious and unwholesome materials and ingredients not fit to be eaten as aforesaid; whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths, to the great damage of the said prisoners of war, to the great discredit of our said lord the king, to the evil example, &c. and against the peace, &c. (*b*).

(*a*) In the case of *R. v. Dickson*, sittings after Easter term, 1814, the defendant was tried upon information, which charged, that he being employed to bake bread for the use of the children in the Royal Military Asylum at Chelsea, being a wicked and evil disposed person, did unlawfully, and for the sake of wicked lucre and gain, and in violation of the trust and confidence reposed in him, deliver to C. D. and E. F. officers of the R. M. A. seventeen loaves as good and wholesome bread, for the use, &c.; whereas, in truth and in fact, the same was not wholesome or proper for the food of man, he well knowing, &c.

In the ensuing Trin. term, it was objected in arrest of judgment, that the noxious materials which rendered the food unwholesome, ought to have been stated; but the court held, that the indict-

ment was sufficient, and Mr. J. Dampier observed, that the same objection had been taken and overruled in *Treeve's* case, vide *infra*. See *R. v. Dixon*, 3 M. & S. 11, Append.

(*b*) *R. v. Treeve*, Corn. Ass. 1796. East. P. C. 821. It was objected in arrest of judgment, that it did not appear that the defendant acted in violation of any contract or of any moral or civil duty; but all the judges held, that the conviction was proper.

The defendant, in the above case, supplied the prisoners under a contract; but it was holden to be unnecessary to state this in the indictment, otherwise than as matter of aggravation, since the giving to any person unwholesome victuals not fit for man to eat, *lucri causâ*, or from malice or deceit, is an indictable offence apart from any other consideration. East. P. C. 822. 4 Bl. Comm. 182.

257. *Indictment for erecting and continuing a soap manufactory near an highway and dwelling houses.*

That A. B. late of, &c. manufacturer of soap, on, &c. with force and arms, at, &c. near to divers public streets, being the king's common highways, there and also near to the dwelling-houses of divers liege subjects of our said lord the king, there situate and being, did unlawfully and injuriously make, erect, and build, and cause and procure to be made, erected, and built, a certain erection or building for the purpose of making and manufacturing soap therein, and did unlawfully and injuriously make, set up, and place, and cause and procure to be made, set up, and placed in the said erection or building, divers furnaces, stoves, cauldrons, coppers, and boilers, to wit, ten furnaces, twenty stoves, twenty cauldrons, twenty coppers, and twenty boilers, for the purpose of boiling, melting, and mixing tallow, soap-lees, and other materials, used in the making or manufacturing of soap; and that the said A. B. did, on the day and year aforesaid, and on divers other days and times, between that day and the day of the taking of this inquisition, at, &c. unlawfully and injuriously boil, melt, and mix together, and cause and procure to be boiled, melted, and mixed together, in the said furnaces, stoves, cauldrons, coppers, and boilers, respectively, so made, set up, and placed in the said erection or building, as aforesaid, divers large quantities of tallow, soap-lees, and other materials used in the making and manufacturing of soap, for the purpose of making and manufacturing the same into soap, and did then and there make and manufacture, and cause and procure to be made and manufactured, divers large quantities of soap from the same tallow, soap-lees, and other materials; by reason of which said premises, divers noisome, offensive, and unwholesome smokes, vapours, smells, and stench, on the days and times aforesaid, were emitted and issued from the said erection or building, so that the air, on the several days and times aforesaid, at, &c. was thereby greatly filled and impregnated with the said smokes, vapours, smells, and stench, and was rendered and became and was corrupted, and offensive, uncomfortable, and unwholesome, to the great damage and

common nuisance of all the liege subjects of our said lord the king, there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways, and against the peace of our said lord the king, &c.

(Second count, for continuing the building, &c.) That the said A. B. on, &c. and continually from that time till the time of taking this inquisition, with force and arms, at, &c. a certain other erection or building, for the purpose of making and manufacturing soap therein, and divers furnaces, stoves, cauldrons, coppers, and boilers, to wit, ten furnaces, twenty stoves, &c. made, set up, and placed in the said last-mentioned erection or building, for the purpose of making and manufacturing the said soap, before that time by certain persons to the jurors aforesaid as yet unknown, near unto divers public streets, being the king's common highways there, and also near unto divers houses of many of his majesty's liege subjects there situate, and being unlawfully made, erected, and built, did unlawfully continue, and yet doth continue; and that the said A. B. on the day and year last aforesaid, at, &c. did unlawfully boil, melt, and mix together, in the said last-mentioned furnaces respectively, so unlawfully made, erected and built, and set up in the said last-mentioned erection or building as aforesaid, divers large quantities of tallow, soap lees, and other materials used in making and manufacturing soap; by means of which said last-mentioned premises, divers noisome, offensive, and unwholesome smokes, vapours, smells, and stench, on the days and times last aforesaid, were emitted and issued from the said last-mentioned building; and the air, on the days and times last aforesaid, at, &c. was thereby greatly filled and impregnated with the said last-mentioned smokes, vapours, smells, and stench, and was thereby rendered and became, and was corrupted, offensive, uncomfortable, and unwholesome, to the great damage and common nuisance of all the liege subjects of our said lord the king there residing and inhabiting, and going, returning, and passing through the said streets and highways, and against the peace, &c.

(Third count, for mixing lees, and boiling tallow, soap, &c.) That the said A. B. on, &c. with force and arms, at, &c. near to the dwelling-houses of divers of his majesty's liege subjects there situate, and also near to divers public streets being common highways there, divers large quan-

ties of tallow, oil, lime, potashes, soap lees, and other noisome and offensive materials, did boil, melt and mix together, and cause and procure, &c. by means of which said last-mentioned premises, divers noisome, noxious, and unwholesome smokes, vapours, smells, and stench, on the days and times last aforesaid, at, &c. aforesaid, were emitted and issued from the said last-mentioned tallow, oil, soap-lees, and other materials, so boiled, melted, and mixed together as last aforesaid, and the air there, on the days and times last aforesaid, was thereby greatly filled and impregnated with the said last-mentioned smokes, vapours, smells, and stench, and was thereby rendered, and then and there became and was greatly corrupted, offensive, uncomfortable, and insalubrious, to the great damage and common nuisance, &c. (*as in the 1st count.*)

258. *Indictment for keeping hogs near a public street (d).*

(*Commencement as in pr. 261, to the *.*) Near the dwelling-houses of divers liege subjects of our said lord the king, and also near divers public streets and common highways there, did, and yet doth, keep ten hogs; and the said hogs, then and there, to wit, on, &c. and on the said other days and times, at, &c. unlawfully and injuriously did feed, and yet doth feed, with the offal and entrails of beasts, and other filth, * by reason whereof divers noisome and unwholesome smells and stench, during the time aforesaid, did from thence there arise, and the air there was, and yet is, thereby greatly corrupted and infected, to the great damage and common nuisance not only of all the liege subjects of our said lord the king there resident and dwelling, but also of all the liege subjects of our said lord the king passing and repassing in, by, and through the said streets and common highways there, against the peace, &c.

259. *Indictment for erecting a furnace, with a boiler, to be used for the boiling of tripe and the offal of beasts.*

That A. B. late of, &c. on, &c. at, &c. near the dwel-

(d) This is an offence at common law. 2 Lord Raym. 1163,

ling-houses of divers liege subjects of our said lord the king there, and also near divers streets and common highways there, did unlawfully and injuriously erect and set up, and cause to be erected and set up, a certain furnace, with a boiler, to be used for the boiling of tripe, and other entrails and offal of beasts; and that the said A. B. on, &c. and on divers other times and days between that day and the day of the taking of this inquisition, at, &c. divers large quantities of tripe, and other entrails and offal of beasts, in the said boiler, unlawfully and injuriously did boil, and yet doth boil. (*Conclude as in pr. 258, from the *.*)

260. *Indictment for boiling bullocks' blood for making colours.*

(*Commence as in pr. 261, to the *.*) In a certain building belonging to the dwelling-house of the said A. B. there situate and being, and also near the dwelling-houses of divers subjects of our said lord the king, and near divers public streets and common highways there, did unlawfully boil, and cause to be boiled, a great quantity of bullock's blood and other filth, for the making and mixing of colours. (*Conclude as in pr. 258, from the *.*)

261. *Indictment against a butcher for using his shop as a slaughter-house in a public market.*

That A. B. late of, &c. on, &c. and on divers other days and times, between that day and the day of the taking of this inquisition, with force and arms, at, &c. * in a certain shop of him the said A. B. situate and being in a common market there, called ———, (the said market being a common passage for all the liege subjects of our said lord the king, with their goods, chattels, and merchandizes, to go, return, pass, and repass at their free will and pleasure,) did unlawfully and injuriously kill and slay, and cause to be killed and slain, ten lambs, and the excrement, blood, entrails, and other filth coming from the said lambs, did then, and on the said other days and times respectively, there cause and permit to lie and remain in the said shop for a long time, to wit, for the space of five hours, on each of those days, whereby divers filthy and unwholesome smells and stench from the excrement, blood, entrails, and other filth coming from the lambs aforesaid, then, and on the said

other days and times respectively, there did arise, and the air there was thereby greatly corrupted and infected, to the great damage and common nuisance not only of all the liege subjects of our said lord the king near there inhabiting and dwelling, but also of all other the liege subjects of our said lord the king, in, by, and through the said common market and passage going, returning, passing, repassing, and labouring, and against the peace, &c.

262. *Indictment for erecting obstructions in a navigable river.*

That a certain part of the river ——— situate and being between ——— and ———, and also wholly situate and being in the county of D. is, and from time whereof the memory of man is not to the contrary hath been, an ancient river, and the king's ancient and common highway (e) for all the liege subjects of our said lord the king and his predecessors with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, row, pass, repass, and labour, at their will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, That A. B. late of, &c. fisherman, on, &c. and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at, &c. unlawfully, wilfully, and injuriously did erect, place, fix, put, and set in the said river and king's ancient and common highway there, (f) (a certain snare, trap, machine, and engine for the catching, and taking of fish, commonly called putts, and composed of wood, wooden stakes, and twigs;) and that he the said A. B. from the day and year first aforesaid, hitherto, with force and arms, at, &c. the said putts unlawfully, wilfully, and injuriously hath continued, and still doth continue, so erected, placed, fixed, put, and set in the said river and king's ancient and common highway; by means whereof the navigation and free passage of, in, through, along, and upon the said river ——— and the king's ancient and common highway there, on the same day and year aforesaid, and from thence, hitherto hath been, and still is, greatly straightened, obstructed, and confined, to wit, at, &c. so that the liege

(e) A river common to all is properly termed an highway. 1 Haw. c. 76. s. 1.

(f) Describe the obstruction according to the fact.

subjects of our said lord the king, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels in, through, along, and upon the said river, and king's ancient and common highway there, on the same day and year aforesaid, and from thence hitherto could not nor yet can go, navigate, sail, row, pass, repass, and labour with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and king's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river ——— and the king's ancient and common highway there, to the great obstruction of the trade and navigation of and upon the said river, against the peace, &c.

263. *Indictment for keeping a disorderly house (g).*

(Commencement as in *pr.* 261, to the *.) Did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house; and in his said house, for his own lucre and gain, certain persons, as well

(g) Lewdness is properly punishable by the ecclesiastical law, but the offence of keeping a bawdy-house comes also under the cognizance of the temporal courts, as a common nuisance, not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes, 3 Inst. 205. 1 Haw. 196.

And offenders of this kind are punishable not only with

fine and imprisonment, but also with such infamous punishment as to the court, in discretion, shall seem proper. Ibid.

And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy-house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 Haw. 2. 3.

men as women, of evil name and fame, and of dishonest conversation; to frequent and come together, then, and on the said other days and times, there unlawfully and wilfully did cause and procure; and the said men and women, in his said house, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, and whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the liege subjects of our said lord the king there inhabiting, residing, and passing, and against the peace, &c.

264. *Indictment for digging a hole in a street, being the king's highway.*

(*Commencement as in pr. 1.*) In a certain street, being the king's common highway there, called ———, (used for all the king's subjects with their horses, coaches, carts, and carriages, to go, return, ride, pass, repass, and labour, at their free will and pleasure,) unlawfully and injuriously * did dig, and cause to be dug, a certain pit, containing in circumference fifteen feet, and in depth thirteen feet; and the same pit, so as aforesaid dug, and caused to be dug, in the street and highway aforesaid, from the day and year aforesaid, until ———, at, &c. unlawfully and injuriously did continue; ** by reason whereof the king's subjects, during the time aforesaid, could not go, return, pass, repass, ride, and labour with their horses, coaches, carts, and carriages, in, by, and through the same street and highway as they were wont and ought to do, without great peril and danger of their lives, to the great damage and common nuisance of all the liege subjects of our said lord the king, in, by, and through the same street and highway, going, returning, passing, repassing, riding, and labouring, and against the peace, &c.

265. *Indictment against nightmen for laying soil in the streets.*

(*Commencement as in pr. 1.*) In the common street and king's highway there, called ———, unlawfully and injuriously did pour out, discharge, place, and leave, and cause to be poured out, discharged, placed, and left, a great quantity of dung, human excrement, and other

filth, by which divers hurtful and unwholesome smells and stench from the said dung, excrement, and other filth, did then and there arise, and thereby the air there became and was greatly corrupted and infected, to the great damage, &c. (*Conclude as in the last pr.*)

266. *Indictment for obstructing a public street.*

(*Commencement as in pr. 264, to the *.*) Did put and place three empty drays, and did then, and on the said other days and times, there unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in the king's common highway aforesaid for the space of divers hours, to wit, for the space of five hours, on each of the said days, whereby the king's common highway aforesaid then, and on the said other days, for and during all the said times on each of those days respectively, was obstructed and straightened. (*Proceed as in pr. 264 from the **.*)

267. *Indictment for obstructing a common passage.*

(*Commencement as in pr. 1.*) In a certain passage and common footway there, called ————, unlawfully and injuriously did dig and make, and cause to be dug and made, a certain hole, containing in length twelve feet, in breadth six feet, and in depth six feet; and that the said A. B. on, &c. with force and arms, at, &c. to wit, in the same passage and common footway, unlawfully and injuriously did erect, put, and place, and cause to be erected, put, and placed, a certain wooden cistern, containing in length five feet, and in breadth twenty inches; and that the said A. B. the said hole, so as aforesaid dug and made, and also the said wooden cistern, so as aforesaid erected, put, and placed, from the day and year aforesaid, until the day of the taking of this inquisition, with force and arms, at, &c. unlawfully and injuriously did continue, and yet doth continue; by means whereof the same passage and common footway, for and during the whole time aforesaid, was so obstructed, and was, and yet is, so dangerous, that the liege subjects of our said lord the king through the same passage and common footway could not, nor yet can, go, return, pass, and repass, so freely and safely as they ought and were wont

and accustomed to do, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the king through the same passage and common footway going, returning, passing, and re-passing, and against the peace, &c.

268. *Indictment at common law against a sabbath-breaker, and profaner of the Lord's day, in keeping open shop.*

That A. B. late of, &c. labourer, on, &c. and from thence until the taking of this inquisition, at, &c. was, and yet is, a common sabbath-breaker, and profaner of the Lord's day, commonly called Sunday: and that the said A. B. on, &c. being the Lord's day, and on divers other days and times, being the Lord's days, during the time aforesaid, at, &c. in a certain place there, called Clare-market, did keep a common, public, and open shop, and in the same shop did then, and on the said other days and times, being the Lord's days, there openly and publicly sell and expose to sale flesh-meat to divers persons, to the jurors aforesaid as yet unknown, to the common nuisance of all the liege subjects of our said lord the king, and against the peace (*h*), &c.

269. *Indictment against the inhabitants of a parish for not repairing a common highway.*

That on, &c. there was (*i*), and from thence hitherto hath been, and still is, a certain common king's highway (*k*), leading from A. (*l*), in the county of C. towards

(*h*) In *R. v. Brotherton*, Str. 708. the court refused to quash an indictment of this kind, which did not conclude against the form of the stat. but judgment was afterwards given for the defendant. See the stat. 29 G. 2. c. 7. 1 Haw. c. 6. s. 12. 3 East. P. C. 5.

(*i*) In the older precedents it is usually stated *from time whereof*, &c. but this is unne-

cessary. 3 T. R. 265. 2 Saund. 158. b. n. 4.

(*k*) Every way which is common to all the king's subjects, is properly termed an highway, so that even a river which is common to all, may be called an highway. 1 Haw. c. 76. s. 1. Co. Litt. 56. Str. 54. 10 Mod. 383.

And the road, &c. may be stated generally to be a common king's highway, without

and unto D. in the said county, for all the liege subjects of our said lord the king, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure; and that a certain part of the same king's common highway, situate, lying, and being in the parish of F. (*m*), in the county of M. containing in length (*n*) ———, and in breadth ———, on, &c. was and

saying whether for carts or for foot passengers only; see 2 Saund. 158. n. 8. Trem. 201. 205. Cro. Car. 266. 1 Salk. 359.

(*l*) As to the local description of the road, see p. 61. 179.

A material variance from the description in the indictment will be fatal; thus an averment that the highway leads from A. to C. is not satisfied by evidence of a road leading from A. to B. and communicating with C. by means of a cross road. *R. v. Great Canfield*, 6 Esp. 136.

A description, that an highway leads between A. and B. excludes both A. and B.; so does an averment that it leads from A. to B. see p. 66. 190, 1. 2 Saund. 158. n. 6. Halsey's case, Latch. 183. Cas. temp. Hard. 105. *R. v. All Saints and St. Mary*, 4 Burr. 2090. *R. v. Harrow*, 1 Haw. 79. s. 86.

But in pleading an highway, it is unnecessary to set out the *termini*, or to allege that it leads from one place to another; it is sufficient to aver that it is an highway. *R. v. Thompson*, cited Andr. 145. *R. v. Hamond*, 10 Mod. 382. *R. v. Haddock*, Andr. 145. And see 1 H. B. 351. Latch. 183. Pal. 389. 2 Roll. Rep. 412.

(*m*) In an indictment against a parish, it must be expressly

VOL. II.

averred that the road out of repair lies within the parish. Cowp. 3. *R. v. Hartford*, 2 Saund. 158. n. 5. supra, p. 190, 1. In every indictment against a parish three averments are essential: 1. That the road is an highway. 2. That it is out of repair. 3. That it is situated in the parish.

A parish is bound of common right to the repair of all highways within it. See 1 Str. 181. *R. v. the Inhabitants of Norwich*, 1 Roll. Abr. 890. 1 Haw. c. 76. s. 5. But the whole of the parish must be indicted, since no sub-division can be liable, unless by virtue of a prescription, custom, or legislative provision; see note below. And if the parish be situate partly in each of two counties, still the indictment must charge the whole parish, and not such part as is within one county only. *R. v. Clifton*, 5 T. R. 498. contrary to what had been decided in *R. v. Weston Under Penyard*, 4 Burr. 2507.

So a presentment against a subdivision of a parish must shew the obligation of the inhabitants to repair, 2 T. R. 513. Sty. 163. Andr. 276.

(*n*) As to averring the extent of the nuisance, see p. 192; in-

x 8

from thence until the day of the taking of this inquisition, hath been and still is at the parish of F. in the county aforesaid, very & ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lord the king through the same way, with their horses, coaches, carts, and carriages, could not, during the time last aforesaid, nor yet can, go, return, pass, repass, ride, and labour, without great danger of their lives, and the loss of their goods, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same way going, returning, passing, repassing, riding, and labouring, and against the peace of our said lord the king, his crown and dignity*, and that the inhabitants of the said parish of F. in the said county of M. the common highway aforesaid, so as aforesaid being in decay, ought to repair and amend when and so often as it should or shall be necessary.

270. *A presentment on the view of a justice for not repairing a highway.*

Middlesex. J. S. esquire, one of the justices of our lord the king, assigned to keep his peace in and for the said county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, by virtue of the statute in such case made and provided, upon his own proper knowledge and view, presents, in manner (o) and form following, that is to say,

dictments for want of such averments have been holden to be defective, 1 Haw. c. 76. s. 88. Cas. Temp. Hardwicke, 106; but qu. whether such an objection would now prevail, for the reason stated, p. 192. and see 2 Saund. 158. note 7. and Say. 301. where it was holden, that an indictment alleging that an highway and bridge were in a ruinous condition was not bad, though the extent was not set out.

An indictment for not re-

pairing one side of a road ought to state that the defendant is bound to repair *ad flum viæ*; and it appears to be insufficient to allege that a certain part, setting out the length and half the breadth, is out of repair, and that the defendant is bound to repair it. Peake. N. P. 219.

(o) Such a presentment may be removed by the prosecutor, before it is traversed and judgment is given, Cowp. 178. and see 2 Str. 1209. though

(and then proceed as in pr. 269, and conclude) in testimony whereof the said J. S. to these presents hath set his hand and seal, this ——— day of ———, in the year aforesaid (p).

271. *Against an individual for not repairing a road, to the repair of which he was bound, ratione tenuræ.*

*The form is the same with that of pr. 269, inserting after the *, and that A. B. late of, &c. esquire, ought, by reason of his tenure (q) of certain lands, (r) situate, lying,*

the act directs that such presentment shall not be removed from the quarter sessions, &c. till it be traversed and judgment be given thereupon, except where the duty or obligation of repairing may come in question.

(p) Ibid.

(q) As against an individual the indictment must shew his obligation to repair, see p. 161; but if he be bound by reason of tenure, it is sufficient to allege his obligation, generally, in the above form, either in an indictment or in a plea, since a prescription is implied in the estate of inheritance in the land. Co. Ent. 358. Keil. 52. pl. 4. 1 Haw. c. 76. s. 8. And he may be charged *ratione tenuræ* generally, without saying *ratione tenuræ sue*; for *ratione tenuræ* implies such a tenure as makes the party chargeable, 1 Vent. 331. *R. v. Fanshaw*, 1 Str. 187. *R. v. Corrock*, 1 Saund. 158. n. 9. But these are technical and appropriate words, whose meaning has been established by long usage, and their absence cannot be supplied by new modes of expres-

sion of equal brevity. See Sty. 400. and *R. v. Kerrison*, 1 Maule and Selwyn, 435.

A private person may also be bound to repair an highway by inclosing the lands on each side of the highway; for before the inclosure the public had a right, when the way was bad, to make use of the lands adjoining; and as this advantage is taken away by the inclosure, the law requires that the person who is benefited by it to make compensation to the public, by maintaining the road in good order. 1 Haw. c. 76. s. 6. 1 Roll. Ab. 390. Cro. Car. 366. and for this reason, it is not sufficient that he keep the road in as good a state of repair as when he inclosed the lands, if it was not then in a good state of repair. Ib. And, if the owner inclose land on one side of a road, which has been anciently inclosed on the other, he is bound to repair the whole way; but if there be no ancient inclosure on the other side, he is bound to repair one half only. 1 Haw. c. 76. s. 7. And, in such case, he ought to

and being, at, &c. in the county aforesaid, to repair and amend the said highway, when and so often as it shall be necessary.

272. *Against a particular division of a parish for not repairing an highway.*

That on, &c. and long before, there was, and from thenceforth continually hitherto there hath been, and still is, a certain common king's highway, leading from Halifax, in the West Riding of the county of York, towards and unto Holmfirth, in the West Riding aforesaid, used for all the liege subjects of our said lord the king, to go, return, pass, and repass, on foot and on horseback, and with cattle, carts, and carriages, at their will and pleasure, and that a certain part of the said common king's highway, situate and being in that part of Lockwood which lies within the constabulary of Q. in the parish of A. in the riding aforesaid, beginning at (s) M. in the parish aforesaid, in the riding aforesaid, and extending from thence to a certain place called D. and containing in length divers, to wit, ——— yards, and in breadth, divers, to wit, ——— feet, on, &c. and from thence continually, until the day of taking this inquisition, at that part of L. aforesaid which lies within the constabulary of Q. aforesaid, in the parish aforesaid, in the riding aforesaid, was and still is very, &c. (*as in pr. 269, from § to *.*) And that within the parish of A. aforesaid, in the riding aforesaid, from time whereof the memory of man is not to the contrary, there have been and still are divers townships, districts, divisions, and places, whereof that part of Lockwood aforesaid which lies within the constabulary of Q. aforesaid, during all the time last aforesaid, hath been and still is one; and that (t) the inhabitants of that part of

be charged in the indictment with not repairing the road *ad filum viæ*. Peake, 219, and see the observations of Abbot, C. J. *Steel v. Prickett*, 2 Starkie's C. 469. See the pleas below.

(r) The situation of the lands should be specified.

(s) See note (l), p. 693.

(t) Since the inhabitants of

a particular division of a parish are not bound, by the common law, to repair the roads within that division, their obligation must be set forth: see p. 161, and see 2 Saund. 158. n. 9. And where the obligation is upon the inhabitants of a particular district, it must arise either from custom, prescrip-

Lockwood which lies within the constabulary of Q. aforesaid, in the parish aforesaid, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate and being within that part of Lockwood aforesaid, which lies within the constabulary of Q. aforesaid, as would otherwise be repairable and amendable by the inhabitants of the said parish at large; and that the said part of the same common highway hereinbefore mentioned, to be ruinous, deep, miry, broken, and in decay as aforesaid, now is, and during all the time when the same part of the said common highway is above alleged to be, ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which, but for the said prescription or usage, would be repairable and amendable by the inhabitants of the said parish of A. at large. And that by reason of the premises, the inhabitants of that part of Lockwood, which lies within the constabulary of Q. aforesaid, in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend the same part of the said common highway, so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary.

(Second count states the prescription thus,) That within

tion, or from some legislative provision. Hence, it is not sufficient to allege, that the inhabitants of a particular district, from time immemorial, ought to repair and amend, but it ought to be averred, that the inhabitants, from time whereof the memory of man is not to the contrary, *have been used and accustomed*, &c. as in the above precedent, which was drawn by a gentleman of great skill and experience. See 5 Burr. 2700. 2 T. R. 11. and 2 Saund. 158. n. 9. and the

cases there referred to. But an individual cannot be bound by prescription, that he and his ancestors, &c. have been accustomed, &c. to repair an highway or bridge, unless in respect of the tenure of land, taking toll, &c.; for the act of the ancestor cannot charge the heir without profit, but a corporation or parish, &c. may be bound to such repair by prescription. See 1 Haw. c. 76. s. 8. 13 Rep. 33. 3 Bac. A. B. 58. 2 Saund. 158. n. (9).

A particular subdivision of a

the parish of A. aforesaid, in the riding aforesaid, from time whereof the memory of man is not to the contrary, there have been and still are divers townships, districts, divisions, and places, whereof that part of L. which is within the constabulary of Q. aforesaid, during all the time last aforesaid, hath been and still is one; and that the inhabitants of the said several and respective townships, districts, divisions, and places, respectively, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, independent of each other, when and so often as it hath been or shall be necessary, such and so many of the several and respective common king's highways respectively situate and being within the said respective townships, districts, divisions, and places, as would otherwise be repairable and amendable by the inhabitants of the said parish of A. at large.

273. *Indictment against the inhabitants of a township for not repairing a road set out by the commissioners, under inclosure acts.*

That before the day of taking this inquisition, by a certain (u) act of parliament, made in the parliament of our lord the now king, at a session thereof holden at Westminster, in the 10th year of this reign, entitled, "An Act

parish may be bound by immemorial custom and prescription to repair all the roads within it; or a particular district within a county may be bound by such immemorial custom and prescription to repair all the public bridges within that district, without either alleging or proving any consideration for the obligation. *R. v. the Inhabitants of the W. R. of Yorkshire*, 4 B. & A. 623. *R. v. Inhabitants of Ecclesfield*, 1 B. & A. 348. *R. v. Inhabitants of St. Giles's Cambridge*, cited *ib.* Gateward's

case, 6 Co. 810. But an advantage may be gained by alleging a general custom within the parish, &c. for each subdivision to repair, as well as a custom simply for the individual subdivision indicted to repair its own roads, since it admits evidence in support of the general custom, 4 B. & A. 623. If there be any exception to the general custom, they must be alleged, see *R. v. Ecclesfield*, 2 Starkie, C. 393.

(u) See the observations, p. 213, 14, 15.

for dividing and enclosing such of the open Parts of the District, called the Forest of Knaresborough, in the County of York, as lie within the eleven Constableries thereof, and for other Purposes therein mentioned," it was (amongst other things) enacted, that C. D., E. F., &c. and their successors, to be nominated and appointed in manner hereinafter mentioned, should be and they were thereby appointed commissioners for setting out, dividing, assigning, and allotting all the open commonable grounds and waste lands within the said eleven constableries, and for putting the said act in execution; and that the said commissioners, or any three or more of them, should, and they were thereby required to set out and appoint, &c. (*as in the act,*) as in and by the said act, reference being thereunto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, further present, that after the making of the said act, and before the day of the taking of this inquisition, that is to say, by a certain other act of parliament, made in the said parliament, at a session thereof holden at Westminster, in the 14th year of the reign of our said lord the now king, entitled, "An Act, to amend an Act, passed in the 10th Year of the Reign of his present Majesty, entitled, 'An Act for dividing and enclosing such of the open Parts of the District called the Forest of Knaresborough, in the county of York, as lie within the eleven Constableries thereof; and for other purposes therein mentioned,'" it was amongst other things enacted, that, &c. (*setting out so much of the act as is material,*) as in and by the said last-mentioned in part recited act, reference being thereunto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, further present, that afterwards, and after the making and passing of the said several acts of parliament, and before the day of the taking of this inquisition, to wit, on, &c. at, &c. the said C. D., E. F., &c. in the said first in part recited act mentioned, respectively, pursuant and in obedience to the said several acts, took upon themselves the execution of the several powers and authorities reposed in them in and by the said several acts, as such commissioners as aforesaid. And the jurors aforesaid, upon their oath aforesaid, further present, that after the making and passing of the said several acts, and after the said commissioners had taken upon them the execution of the powers and authorities so vested in them, by the said

several acts as aforesaid; and immediately after the said commissioners had made the aforesaid division, and settled all the said several allotments, pursuant to the directions of the said acts, to wit, on, &c. at, &c. they, the said commissioners, did form and draw up, and cause to be fairly engrossed on parchment, and did duly execute, under their hands and seals, a general award or instrument, in manner and form as was by the said first in part recited act directed, and by their said general award, amongst other ways and roads therein set out and appointed, did also set out and award, and did award the same to be for ever, carriage roads, a certain part of the said open commonable grounds and waste lands, called ———, beginning at ———, and leading westward to ———, and a certain other part, &c. beginning at ———, and leading southward to ———, which said two roads, in pursuance of the powers given to the said commissioners, by the second act, they the said commissioners did thereby award to be made and kept in repair by the said inhabitants and occupiers of lands and tenements within the township of ———, and did thereby award that the road should be called by the names above mentioned, as by the said award, reference being thereunto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, further present, that the said last-mentioned roads were and are roads leading into, through, and adjoining the said allotments, in the second act mentioned, to wit, at the township of ——— aforesaid. And the jurors aforesaid, upon their oath aforesaid, further present, that a certain part, to wit, ——— yards in length (x), and ——— yards in breadth, of the said carriage roads, so set out and appointed to be carriage roads for ever, as aforesaid, afterwards, and after the making of the said award, of the said commissioners, in manner and form aforesaid, and after the said roads had been completed, made, and found, as required by the said act, to wit, on, &c. and from thence continually, until the day of the taking of this inquisition, to wit, at the township of ——— aforesaid, in the county aforesaid, were and still are miry, ruinous, broke in, and in great decay, for want of the due reparation and amendment of the same, so that the liege subjects of our said lord the king, by themselves, and with their horses, coaches, carts, and carriages,

(x) See p. 192.

could not, during all the time aforesaid, nor yet can, go, return, pass, ride, and labour, without great danger of their lives, and the loss of their goods, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same carriage roads, going, returning, passing, riding, and labouring, contrary to the form of the acts of parliament aforesaid, and against the peace of our said lord the king, his crown, and dignity; and that the inhabitants and occupiers of lands and tenements, within the said township of ———, in the county of ———, aforesaid, the said carriage roads so as aforesaid being in decay, by force of the said several acts, and by virtue of the said general award, so in pursuance thereof by the said commissioners made as aforesaid, ought, during the time last aforesaid, to have repaired and amended, and still ought to repair and amend, when and so often as it hath been or shall be necessary.

274. *For not repairing a public bridge.*

That a certain common bridge, commonly called ———, lying and being in the parish of B. in the county of E. in the common king's highway, there leading from B. aforesaid, in the county aforesaid, to the town of R. in the same county, being a common highway for all the liege subjects of our said lord the king, and his predecessors, with horses, carts, and carriages, to pass and repass, ride and labour, at their free will and pleasure, on, &c. was and still is in great decay, broken and ruinous, so that the liege subjects of our said lord the king, in, upon, and over the said bridge, with horses, carts, and carriages, could not and cannot pass and repass, ride and labour as they ought and were accustomed to do, to the great damage and common nuisance, &c. and against the peace, &c. (*If the prosecution be against an (y) individual ratione tenuræ, then allege,*) and that A. B. late of, &c. by reason of his tenure of certain lands, lying in the parish of B. in the said county, is bound to repair and amend the said

(y) If the indictment be against an individual for not repairing the bridge according to an obligation *ratione tenuræ*, it would be proper to allege

that the bridge had existed from time immemorial. See the precedents given below, and referred to in the Index.

common bridge as often and whenever it shall be necessary. (*If against a county allege,*) and that the inhabitants of the county aforesaid are bound to repair and amend the said common bridge, when and so often as it shall be necessary.

OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE, &c.

275. *Against a township for a misdemeanor in burying a body without notice to the coroner, &c. (y).*

That on, &c. one W. D. died at the township of C. in the county of N. of a violent death and not of a natural death, that is to say, the said W. D. then and there died of a violent wound, before that time, to wit, on, &c. at the township aforesaid, in the county aforesaid, given to the said W. D. by some person or persons to the jurors aforesaid unknown, and that the body of the said W. D. on, &c. at the township aforesaid, in the county aforesaid, lay dead; and that, at the several times aforesaid, C. F. and W. S. were coroners of our lord the king for the said county of N. to wit, at the township aforesaid, in the county aforesaid, of which said premises the inhabitants of the said township of C. in the said county, afterwards, to wit, on, &c. at the township of C. aforesaid, in the county aforesaid, had notice; nevertheless, the inhabitants of the said township of C. in the county aforesaid, well knowing the premises, but not regarding their duty in that behalf, did not, nor did any of them, at any time, send or give any notice to or for the said C. F. or the said W. S. or either of them, nor to or for any coroner of our said lord the king, for the said county of N. to view the body of the said W. D. so lying dead as aforesaid, but unlawfully, obstinately, and contemptuously, omitted and neglected so to do; nor had the said C. F. or W. S. or either of them, or any coroner of our said lord the king, for the

(y) See the case of the town
of Green, in Sussex, 3 Leon.
207. *R. v. the Mayor and*

Commonalty of London, Cro.
Car. 252.

said county, any notice to view the body of the said W. D. so lying dead as aforesaid; nor had the said C. F. or W. S. or either of them, or any coroner of our said lord the king, for the said county, any notice that the body of the said W. D. was so lying dead as aforesaid; neither did the said C. F. or the said W. S. or either of them, or any coroner of our said lord the king for the said county of N. at any time view the body of the said W. D. so lying dead as aforesaid; nor was any inquisition taken, on the view of the body of the said W. D. as by law required in that behalf, but the body of the said W. D. was afterwards, to wit, on, &c. unlawfully and contemptuously buried and interred, at the township of C. aforesaid, in the county aforesaid, without any view being had of the said body of the said W. D. by the said C. F. or W. S. or either of them, or any coroner of our said lord the king, for the said county of N. and without any inquisition being taken on the view of the body of the said W. D. as by law required, in that behalf, to the great hinderance of justice, in contempt of our said lord the king, and against the peace, &c.

276. For rescuing a rioter.

(*After charging a riot as in pr. 241, &c. proceed,*) And the jurors aforesaid, upon their oath aforesaid, do further present, that S. A. esquire, then and there being one of the justices, &c. (*as in pr. 190, from * to **,*) and then and there passing and going along the said town, in the king's highway there, and then and there seeing and observing, upon his own view, the said J. F., C. D., &c. and the said other disorderly persons, and disturbers of the peace of our said lord the king, (to the jurors aforesaid as yet unknown), so then and there assembled and gathered together, and also then and there breaking and disturbing the peace of our said lord the king, and misbehaving themselves in manner aforesaid, he the said S. A. according to the duty of his said office as a justice of the peace of our said lord the king for the said county of S. did then and there arrest and take the said J. F. in order to prevent and restrain him from any further continuing a party in the said riot and disturbance, and to cause him the said J. F. to be imprisoned, in order that he might answer and be duly punished for his offence aforesaid, according to the due form of the laws and customs of

this realm, and then and there had the said J. F. in his custody on that occasion; whereupon the said C. D. &c. (*as before*) and the said other disorderly persons, and disturbers of the peace of our said lord the king (to the jurors aforesaid as yet unknown), being so assembled and gathered together as aforesaid, and not regarding the laws of this realm, nor fearing the pains and penalties therein contained, and unlawfully and wickedly devising and intending to prevent, hinder, and obstruct the due course of law and justice, and to rescue him the said J. F. from and out of the custody of the said S. A. then and there being in the due execution of his office of such justice as aforesaid on that occasion,) did then and there, with force and arms, unlawfully, riotously, routously, and tumultuously make an assault and affray upon the said S. A. and him the said S. A. then and there did beat, bruise, wound, and ill-treat, so that his life was greatly despaired of; and that the said C, D. &c. (*as before, except J. F.*) and the said other disorderly persons, and disturbers of the peace of our said lord the king (to the jurors aforesaid, as yet unknown), being then and there so assembled and gathered together, him the said J. F. out of the custody and power, and against the will, of the said S. A. then and there unlawfully, riotously, and routously did rescue and put at large, to go unpunished for his offence aforesaid, wheresoever he would; and that the said J. F. being so arrested and taken by the said S. A. as aforesaid, himself out of the custody and power, and against the will, of the said S. A. then and there unlawfully, riotously, routously, and violently did rescue, and did escape and go at large unpunished for his said offence wheresoever he would; to the great damage of the said S. A. in contempt of our said lord the king and his laws, and against the peace, &c.

Second count for a riot and assault upon the justice.

277. *Indictment for maintenance (q).*

That one L. P. late of, &c. yeoman, on, &c. and for the space of one whole year then next following, at Westminster, in the county of Middlesex, maintained a cer-

(q) Tremp. P. C. 178. Drawn by Saunders.

tain action, then pending in the court of our said lord the king of his Exchequer, before his barons of the said Exchequer, between one C. W. plaintiff and one D. J. defendant, of a plea of trespass and ejectment of farm, of one hundred acres of land, &c. to the great damage of the said C. W. in contempt of our said lord the king and his laws, against the form of the statutes, &c. and against the peace, &c.

(*Second count.*) *Maintained*, on the part of D. J. and W. J. a certain suit by English bill in the Court of Chancery of our said lord the king at Westminster, in the county of Middlesex, pending between D. J. and W. J. the complainants, and D. L. the defendant, of and concerning the title to the said tenements, in contempt, &c. against the form, &c. and against the peace, &c.

278. *Indictment for compounding felony.*

That one W. D. at the parish of A. in the county of M. in his proper person, came before J. P. esquire, then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, and then and there upon his oath, did charge and accuse one M. the wife of P. J. with feloniously stealing, taking, and carrying away one silver spoon and two silk handkerchiefs, of the goods and chattels of the said W. D.; upon which the said J. P. then and there issued out his warrant under his hand and seal, made in due form of law, for the apprehending and taking the said M. to answer and be examined of and concerning the felony aforesaid, on her, as aforesaid charged: and that afterwards, on, &c. the said M. at, &c. for the said felony, and by virtue of the said warrant, was taken and arrested, and then and there, was brought before the said J. P. the justice aforesaid, and then and there, before the same justice, of and concerning the same felony was examined; upon which the said J. P. the justice aforesaid, then and there did make a certain warrant under his hand and seal, in due form of law directed to the keeper of ——— (r), or his deputy, thereby

(r) According to the warrant.

commanding the aforesaid keeper, or his deputy, to receive into his custody the body of the said M. so charged, with felony as aforesaid, and her in custody safely to keep, until she should be discharged by due course of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. D. late of, &c. labourer, well knowing the premises, but contriving and intending unlawfully and unjustly to pervert the due course of law in this behalf, and to cause and procure the said M. J. for the felony aforesaid to escape with impunity, afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and for wicked gain sake, did take upon himself to compound the said felony, on the behalf of the said M. J. and then and there did exact, receive, and have of the said P. J. the husband of the said M. twenty-six shillings in monies numbered, for and as a reward for compounding the said felony, and desisting from all further prosecution against the said M. J. for the felony aforesaid, to the great hinderance of justice, and against the peace, &c.

279. *Indictment for being a common barretor (c).*

That A. B. late of, &c. labourer, on, &c. and on divers other days and times as well before as afterwards, was and yet is a common barretor; and that he the said A. B. on, &c. and on divers other days and times, at the parish aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet liege subjects of our said lord the king, then and there did move, procure, stir up, and excite, against the peace, &c.

(s) See 4 Bl. Comm. 133. 134. and 8 Eliz. c. 2. 3 E. 1. c. 33.
34 E. 3. c. 1.

CONSPIRACIES.

280. *For a conspiracy, riot, and burning of a prison by journey-men manufacturers.*

That I. S. late of R. in the county (a) palatine of Lancaster, weaver, &c. (*setting out the names,*) late of the same place, weaver, &c. together with divers other evil disposed persons, to the number of 1000 and more, whose names are to the jurors aforesaid as yet unknown, on, &c. with force and arms, at, &c. being workmen and journey-men in the art, mystery, and manual occupation of weavers, and not being content to work and labour in that art and mystery at the usual rates and prices for which they and other such workmen and journeymen had been wont and accustomed to work, but unlawfully devising and intending unjustly and oppressively to augment and increase the wages of themselves and other workmen and journeymen in the said art, mystery, and manual occupation, and unlawfully and unjustly to exact and extort great sums of money for their labour and hire in the said art, mystery, and manual occupation, from the masters who employed them therein, did unlawfully, unjustly, and corruptly combine, conspire, consult, consent, and agree, among themselves, to demand (b), exact, and obtain for themselves and other workmen and journeymen in the said art, mystery, and manual occupation, from the masters who employed them therein, greater wages, hire, and reward, for their labour and work as such workmen and journeymen, than the usual and customary wages, hire, and reward then usually paid for their labour and

(a) As to the venue in an indictment for conspiracy, see p. 27, 8.

(b) An indictment for conspiracy must either shew that it was entered into for an illegal purpose, or that it was intended to effect the object of conspiracy by unlawful means, see p. 155, 56. and East.

P. C. 462. See the information against Lord Grey and others, 3 St. Tr. 519. for a conspiracy to entice Lady Henrietta Berkely to leave her father's house, and cohabit with one of the defendants, and the precedents in Tremaine, tit. Conspiracy. See the precedents below referred to in the Index.

work as such workmen and journeymen, by the masters who employed them as such workmen and journeymen, in the said art, mystery, and manual occupation. And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said conspiracy, combination, and agreement, and in order to carry their said intentions into effect, the said I. S. &c. with the said other evil disposed persons, whose names are to the said jurors as yet unknown, did then and there, and for a long time before and upwards, desist from and totally leave and refuse to continue their labour and work as such workmen and journeymen, and did then and there, and on divers other days and times, as well before as afterwards, in a violent and tumultuous manner meet and assemble together at R. aforesaid, in the county palatine aforesaid, and divers other places, and also then and there, and on divers other days, as well before as after, go about from place to place, and to the warehouses and workshops of divers masters and persons employing such workmen and journeymen in the said art, mystery, and manual occupation, and particularly to the warehouse and workshop of one I. R. and one H. R. being masters and persons as aforesaid, with intent and in order to alarm and terrify the said I. R. and H. R. and other such masters and employers, and by threats and menaces to cause and procure the said I. R. and H. R. and other such masters and employers, to give greater wages, hire, and reward to such workmen and journeymen for their labour and work as such workmen and journeymen, than the usual and customary wages, hire, and reward then usually paid for their labour and work as such workmen and journeymen, by the masters who employed them as such journeymen and workmen in the said art, mystery, and manual occupation; and did then and there cause and procure and compel divers such workmen and journeymen to leave and desist from the work and labour in which they were respectively employed as such workmen and journeymen, and did then and there, with force and arms, seize, take, and carry away from divers workmen and journeymen in the said art and mystery, and manual occupation, divers shuttles of and belonging to such workmen and journeymen respectively, and by them respectively used in their work and labour as such workmen and journeymen, and did also then and there, and on divers other days, as well before as after, unlawfully,

riotously, and tumultuously assemble and gather themselves together, at R. aforesaid, and divers other places in the said country, and remain and continue together for divers long spaces of time, to wit, the space of twelve hours on each of the said days, and during all those times make divers great riots, routs, tumults, and disturbances, to the great terror of all the liege and peaceable subjects of our said lord the king, and did also then and there, to wit, on, &c. with force and arms, unlawfully, riotously, and tumultuously break and enter a certain building, situate and being at R. aforesaid, called the New Bayley, used for the confinement of felons and other offenders, and divers, to wit, 500 shuttlers, then and there being in the said building, did then and there, with force and arms, unlawfully, riotously, and tumultuously seize, take, and carry away, and did also then and there, to wit, on, &c. with force and arms, unlawfully, maliciously, riotously, and tumultuously set fire to the said building, and burn, consume, and destroy the same, to the great damage and oppression, not only of the masters employing them and other workmen and journeymen in the said art, mystery, and manual occupation, but also of divers other liege subjects of our said lord the king, in contempt of our said lord the king and his laws, against the peace, &c.

(*Second count.*) That the said I. S. &c. together with divers other evil disposed persons, to the number of 500 and more, whose names are to the jurors aforesaid as yet unknown, afterwards to wit, on &c. with force and arms, at R. aforesaid, in the county aforesaid, did unlawfully, riotously, routously, and tumultuously assemble and gather together, with intent to break and disturb the public peace of our said lord the king, and being so then and there assembled and gathered together, did then and there, with force and arms, make a great noise, riot, rout, tumult, and disturbance, and did then and there remain and continue together making such noise, riot, rout, tumult, and disturbance for a long space of time, to wit, the space of 12 hours, (*proceed as in the last count from the.**)

281. *For a conspiracy to defraud the prosecutor of his money by fraudulent wagers.*

That J. H. late of, &c. labourer, T. S. late of the same place, labourer, and T. P. late of the same place, labourer, on, &c. wickedly and maliciously devising and

intending unjustly to defraud and injure one T. L. with force and arms, at, &c. between and amongst themselves unlawfully did conspire, combine, confederate, and agree to cheat and defraud the said T. L. of divers bank notes for the payment of money, of and belonging to the said T. L. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. H. in execution of the premises and in pursuance of such conspiracy, combination, confederacy, and agreement, between and amongst them the said J. H., T. S., and T. P., as aforesaid, before had and made, afterwards, to wit, on, &c. at, &c. did unlawfully invite, persuade, prevail upon, and procure the said T. L. to go into a certain public-house or inn, situate and being at L. aforesaid in the county aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. P. in pursuance of such conspiracy, combination, confederacy, and agreement as aforesaid, and in order to carry the same more fully into effect, did then and there, to wit, on the same day and year aforesaid, at, &c. to wit, in the said public-house or inn there, unlawfully and unjustly lay and bet divers false and fraudulent wagers with the said T. L. of and concerning a certain halfpenny to be placed under a pot, that is to say, that he the said T. P. could guess whether the said halfpenny were head or tail three times out of four. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. H. in further pursuance of such conspiracy, combination, confederacy, and agreement, as aforesaid, and in order carry the same more fully into effect, did then and there place and put a certain halfpenny under a certain pot for the purpose of then and there deciding the said false and fraudulent wagers, so laid and bet, as aforesaid; and that the said T. L. did then and there, to wit, on, &c. at, &c. in the said public house, by means of fraud and collusion, then and there had and practised by, between, and amongst the said J. H., T. S., T. P. and by means of the said conspiracy so had between and amongst them as aforesaid, unlawfully and unjustly lose the said wagers. to wit, on, &c. at, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said conspiracy, &c. and by means of the said several false and fraudulent wagers so laid as aforesaid, they the said J. H. T. S. and T. P. did, on, &c. at, &c. unlawfully, wickedly, and deceitfully cheat and defraud the said

T. L. of divers bank notes of and belonging to the said T. L. that is to say, thirty bank notes for the payment of money, that is to say, for the payment of one pound each and respectively, of the value of one pound each and respectively, &c. to the great damage of the said T. L. and against the peace, &c.

(*Second count.*) That the said J. H., T. S., and T. P. being persons of ill fame, name, and dishonest conversation, and wickedly devising and intending, unjustly, unlawfully, and by indirect means, to cheat and defraud the said T. L. of divers other bank notes for the payment of money, on, &c. with force and arms, at, &c. fraudulently, maliciously, and unlawfully did conspire, combine, confederate, and agree, between and amongst themselves, wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud the said T. L. of the said last-mentioned bank-notes, of and belonging to the said T. L.; and that in execution of the said last-mentioned premises, and in pursuance of the said last-mentioned conspiracy, combination, and agreement between and amongst them as last aforesaid, so last made, the said J. H., T. S., and T. P. afterwards, to wit, on, &c. with force and arms, at, &c. by certain undue and unlawful means in that behalf, fraudulently, maliciously, and unlawfully did cheat and defraud the said T. L. of divers other bank notes, that is to say, &c. (*as before,*) and thereby then and there, by the means last aforesaid, did greatly impoverish and injure the said T. L. to the great damage of the said T. L. and against the peace, &c.

Third count, charging the conspiracy generally, without any overt act.

282. *Indictment against two parish officers for conspiring to persuade a poor couple to marry, in order to burthen the man's parish with the maintenance of the woman (c).*

That on, &c. at, &c. one T. S. was a poor single man, and *unable to maintain himself* (d) and any poor woman whom he should marry and take to wife, and that the place of

(c) See the observations, p. 155, 6, &c. and East. P. C. 461. *R. v. Tanner*, 1 Esp. 204. qu. whether this averment be necessary, see East. P. C. 462.

(d) Vide supra, p. 156, 7. and

the last legal settlement of the said T. S. on the said, &c. was, and ever since hitherto hath continued to be, and still is, in the parish of C. in the said county of O.; and that one S. M. now called S. S. and now the wife of the said T. S. on the same day and year aforesaid, and continually from thence until the marriage of the said S. with the said T. S. hereinafter-mentioned, was a poor single woman, *legally settled in (e)*, and actually chargeable to, the parish of M. in the county aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that R. H. late of the said parish of M. yeoman, and W. H. late of the said parish of M. yeoman, well knowing the premises, and unlawfully, wickedly, and wrongfully combining, devising, designing, and intending to exonerate, free, and discharge the parishioners and inhabitants of the said parish of M. from the charge and expense which might ensue to the parishioners and inhabitants of the said parish of M. from the said S. as a poor person, then having a legal settlement in the said parish of M. and then actually chargeable to the said parish of M. and unjustly to oppress and aggrieve the parishioners and inhabitants of the said parish of C. and wrongfully and unjustly to charge and burthen the parishioners and inhabitants of the said parish of C. with the maintenance and support of the said S. on, &c. with force and arms, at, &c. unlawfully and wickedly did conspire, combine, confederate, agree, and meet together, with the wicked intent and purposes aforesaid, to cause and procure a marriage to be had and solemnized between the said T. S. and the said S. (they the said T. S. and S. at the time of such conspiracy, combination, confederacy, and agreement, being such poor persons of the several and respective parishes aforesaid); and that the said R. H. and W. H. in pursuance of the said conspiracy, combination, confederacy, and agreement between them had as aforesaid, afterwards, to wit, on the same, &c. at, &c. * the better and more effectually to complete and perfect the said wicked contrivance, conspiracy, and intention, did *then and there promise (f)* the said T. S. and they the said R. H. and

(e) See the case of *R. v. Edwards*, 8 Mod. 320. where the indictment was quashed for want of this averment; yet it seems to be immaterial

where she was settled, if not in C.

(f) See p. 156, 7. and the cases there cited. Where the

W. H. or one of them, would pay for a license, a wedding ring, a wedding dinner, and all other costs, charges, and expenses in, about, and attending the solemnization, or ceremony of the marriage herein-after next mentioned; and also that they the said R. H. and W. H. or one of them, would give something handsome to the said T. S. and S. and also then and there told the said T. S. that he the said T. S. and the said S. should have no cause to complain, if he the said T. S. would marry and take to wife the said S.; by reason of which said premises he the said T. S. was then and there prevailed upon to consent, and did then and there consent and agree to marry the said S. and did afterwards, to wit, on the same, &c. at, &c. marry and take to wife the said S. (he the said T. S. at the time of the said conspiracy, combination, confederacy, and agreement, and at and after the time of the said marriage, being a poor person as aforesaid, and not having a legal settlement in the said parish of M. but having a legal settlement in the said parish of C. and the said S. at the time of the said conspiracy, combination, confederacy, and agreement, and until the time of the said marriage, being a poor person, having a legal settlement in, and usually chargeable to, the said parish of M.) by means of which said premises, the said inhabitants and parishioners of the said parish of C. for a long time, to wit, ever since the time of the said marriage until the day of the taking of this inquisition, have been put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of ten pounds, in and about the maintenance and support of the said S. and are likely to be put to great trouble and further great charges and expenses in and about the maintaining and supporting of the said S. to the great damage, oppression, and grievance of the said parishioners and inhabitants of the said parish of C. and against the peace, &c.

(*Second count.*) And the jurors, &c. that on the said, &c. at, &c. one T. S. was a poor single man, and unable to maintain himself and a wife: and that the place of the last legal settlement of the said T. S. on the same day and year last aforesaid, was, and hath ever since hitherto continued to be, and still is, in the said parish of C. in the

woman was pregnant by the man and they were willing to be married, it was holden that no indictment lay. *R. v. Fowler, Cor. Buller, J. Taunt. Sp. Ass. 1788. East. P. C. 461.*

said county of O. (*as in the last count, to the *, then proceed thus,*) did unlawfully and unjustly persuade, cause, and procure the said T. S. then being such poor single person and an inhabitant of, the said parish of C. as aforesaid, and the said S. then also being such poor single person, and chargeable to the said parish of M. as aforesaid, to intermarry with each other. And the jurors, &c. that the said T. S. and S. did in consequence thereof, to wit, on, &c. at, &c. intermarry with each other, and that after such marriage was had, as last aforesaid, to wit, on, &c. the said S. was removed as the wife of the said T. S. to the said parish of C. as being the place of the legal settlement of the said T. S. by virtue of a certain order made under the hands and seals of the Rev. J. C. doctor in divinity, and J. W. esquire, then being two of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of O. and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, (the said T. S. being, at the time of such removal, such poor person as aforesaid); by means of which said last-mentioned premises, the parishioners and inhabitants of the said parish of C. have been put to great charges and expenses, &c. (*as before.*)

283. *Indictment against two persons, for conspiring that one of them should rob the other, with intent to charge the hundred.*

That A. B. late of W. labourer, and C. D. late of the same, labourer, being evil-disposed persons, and devising and intending unjustly to oppress and aggrieve divers liege subjects of our said lord the king within this realm, and wrongfully charge them with the payment of great sums of money, to the amount of two hundred and thirty pounds, and upwards, on, &c. with force and arms, at, &c. did unlawfully conspire, combine, confederate, and agree together, that he the said A. B. should, in or near the king's highway there, take from the person of the said C. D. the sum of two hundred and thirty pounds and a silver watch, and that the said C. D. should make oath, before some justice of the peace, of the said pretended robbery; and that the said C. D. in pursuance of he said conspiracy, combination, confederacy, and agree-

ment, did afterwards, to wit, on the same day and year above mentioned, at the parish aforesaid, in the county aforesaid, personally appear before J. D. esq. then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county, and did make and give information in writing, upon oath, to and before the said J. D. then and there being such justice as aforesaid, that about ten of the clock in the forenoon of that day, he the said C. D. was assaulted in the highway leading from C. in the county of W. to L. in the county of S. near a place called the Green Man, in the parish of W. in the hundred of H. in the said county of W. by a tall, lusty man, wearing a dark brown wig and a brown coat, mounted on a black horse or mare, about fifteen hands high, and was by him robbed, in the highway aforesaid, of the sum of two hundred and thirty pounds and a silver watch, and that he the said C. D. did not, at the time of the said robbery, nor then, know the person who committed the said fact, with the fraudulent and wicked intent, and on purpose to charge the inhabitants of the said hundred with the payment of the said sum of two hundred and thirty pounds, under colour of justice and process of law; whereas, in truth and in fact, he the said C. D. was not assaulted in the highway leading from C. aforesaid, in the county of W. aforesaid, to L. in the said county of S. near the said place called the Green Man, in the said parish of W. in the hundred of H. in the said county of W. by a tall, lusty man, wearing a dark brown wig and a brown coat, mounted on a black horse or mare; and whereas, in truth and in fact, he the said C. D. was not at the time in that behalf aforesaid, or at any other time whatsoever, robbed of the sum of two hundred and thirty pounds and a silver watch, as he the said C. D. so swore in and by his said information in writing as aforesaid, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. (*2nd count.*) And the jurors aforesaid, &c. that the said A. B. and C. D. being such evil disposed persons as aforesaid, and devising and intending unjustly to oppress and aggrieve divers subjects of our said lord the king within this realm, and wrongfully to charge them with the payment of great sums of money, to the amount of two hundred

and thirty pounds and upwards, on, &c. with force and arms, at, &c. did unlawfully and wickedly conspire, combine, confederate, and agree together, that he the said C. D. should, in or near the king's highway there, take from the person of the person of the said A. B. the sum of two hundred and thirty pounds and a silver watch, and the said C. D. in pursuance of the said last-mentioned conspiracy, combination, confederacy, and agreement, afterwards, to wit, on the same day and year aforesaid, at the parish of W. aforesaid, in the hundred of H. in the said county of W. did take from the person of the said A. B. the sum of two hundred and thirty pounds and a silver watch, with the fraudulent and wicked intent, and on purpose to charge the inhabitants of the said hundred with the payment of the said last-mentioned sum of two hundred and thirty pounds, and the value of the said last-mentioned watch, by process of law, under colour and pretence that he the said C. D. had been robbed of the same by some person to him the said C. D. unknown, against the peace, &c.

284. Indictment for conspiring to charge a man with a rape, and preferring an indictment against him for the same, with an intent to obtain money from him.

That J. P. late of, &c. labourer, E. his wife, and J. H. late of the same, labourer, being evil-disposed persons, and wickedly devising and intending unjustly to deprive one H. S. of his good name, fame, credit, and reputation, and also to subject the said H. without any just cause, to the loss of his life and forfeiture of his goods, on, &c. with force and arms, at, &c. among themselves did unlawfully and wickedly conspire, combine, confederate, and agree, falsely to charge and accuse the said H. S. that he the said H. S. had then lately before feloniously ravished and carnally known the said E. against her will and consent. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. P., E. his wife, and J. H. afterwards, to wit, on, &c. at, &c. according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, falsely, unlawfully, and for wicked gain sake, in the presence and hearing of divers persons, did charge and accuse the said H. S. that he the said H. S. had then lately before feloniously ravished and carnally

known the said E. And the jurors aforesaid, upon their oath aforesaid, do further present, that in further prosecution of the said wicked devices and intentions of them the said J. P., E. his wife, and J. H. and according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, the said E. afterwards, to wit, on, &c. at, &c. did upon her oath falsely charge and accuse the said H. S. before T. D. esquire, then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, that he the said H. S. then lately before had feloniously ravished and carnally known her the said E. against her will and consent. And the jurors aforesaid, upon their oath aforesaid, do further present, that in further prosecution of the said wicked devices and intentions of them the said J. P., E. his wife, and J. H. and according to the conspiracy, combination, confederacy, and agreement, between them as aforesaid had, the said E. by the name of E. the wife of J. P. afterwards, to wit, at the general quarter session of the peace of our said lord the king, holden at, &c. in and for the county aforesaid, on, &c. before W. M. esq. Sir S. S. knight, J. S. and W. H. esqrs. and others their fellows, justices, &c. did falsely exhibit a certain bill against the said H. S. by the name and addition of H. S. late of, &c. to J. S. gent. (*the grand jurors*) good and lawful men of the said county, then and there sworn, and charged to inquire for our said lord the king, for the body of the said county, which said bill of indictment was, by the said jurors above named, then and there returned in the court aforesaid, before the said justices of our said lord the king above named, and others their fellows aforesaid, thus indorsed, "Not found," which said bill follows in these words, to wit, (*reciting the bill,*) with intent to obtain and acquire unjustly to them the said J. P., E. his wife, and J. H. of and from the said H. S. divers sums of money for compounding the said pretended felony and rape, so falsely charged on him as aforesaid, to the great damage, infamy, and disgrace of the said H. S. and against the peace, &c. (g)

(g) It is unnecessary to aver that H. S. was innocent; for it is alleged that he was *falsely* charged and prosecuted, and

innocence is to be intended until the contrary appears. *Regina v. Best & al.* Trin. 3. Ann. B. R. Salk. 174.

285. *Indictment for conspiring to charge a man with receiving stolen goods, and thereby obtaining money for compounding the same, and causing him to lay out a sum of money for the entertainment of the conspirators at one of their houses.*

That A. B. late of, &c. gent. and C. D. late of the same, labourer, being ill-disposed persons, and wickedly devising and intending one M. N. not only of his credit and good reputation unjustly to deprive, but also to obtain and acquire to themselves of and from the said M. N. divers large sums of money, on, &c. with force and arms, at, &c.* did amongst themselves conspire, combine, confederate, and agree, falsely to charge and accuse the said M. N. with having lately before then received stolen goods. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. and C. D. afterwards, to wit, on, &c. according to the said conspiracy, combination, confederacy, and agreement between themselves before had as aforesaid, falsely, wickedly, and for the sake of lucre and gain, did, in the presence and hearing of divers persons, charge and accuse him the said M. N. that he the said M. N. had bought hats that were stolen, knowing them to have been stolen, and that they the said A. B. and C. D. did then and there, falsely pretend and affirm to the said M. N. that a bill of indictment had been found, at the general session of the peace, holden at the quarter sessions, in and for the said county, on, &c. then last, against the said M. N. for receiving stolen goods, knowing the same to have been stolen; whereas in truth and in fact there was not at the time of such charge and accusation, nor at any time before or since, any bill or bill of indictment whatsoever in any manner found against the said M. N. for the said supposed offence, so falsely charged upon him, or for any such like crime; and whereas in truth and in fact the said M. N. was(h) never guilty of the said supposed offence, or any other offence of that kind. And the jurors aforesaid, upon their oath aforesaid, do further present, that by the said false accusations, and by divers threats, menaces, and allegations of them the said A. B. and C. D. then and there uttered and made, that he the said M. N. should be transported into parts beyond

(h) This allegation is unnecessary.

the seas, for the said pretended offence, they the said A. B. and C. D. did then and there demand, receive, and take of the said M. N. one piece of gold coin, of the proper coin of this realm, called a guinea, for and as a compensation and agreement of the said pretended offence, and to discharge the said M. N. from all further prosecution for the same; and they the said A. B. and C. D. did also then and there, by the false and wicked pretences aforesaid, unlawfully cause and procure the said M. N. to expend and lay out, and the said M. N. did expend and lay out twenty-three shillings, of lawful money of Great Britain, at the dwelling-house of the said A. B. in wine and other liquors, in the company and for the entertainment of them the said A. B. and C. D.* to the great damage, infamy, and disgrace of the said M. N. and against the peace, &c.

286. *Indictment for a conspiracy to charge a man with an unnatural crime, and thereby to obtain money.*

(*Commencement as in the last precedent to the *.*) Did amongst themselves conspire, combine, confederate, and agree, falsely to charge and accuse the said M. N. that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. and C. D. afterwards, to wit, on, &c. at, &c. according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, falsely, unlawfully, and wickedly did charge and accuse the said M. N. that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B. whereas in truth and in fact the said M. N. was never guilty of the said crime, or of any crime of the like nature; and that they the said A. B. and C. D. in pursuance of and according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, afterwards, to wit, on, &c. at, &c. unlawfully, wickedly, and unjustly did obtain, acquire, and get into their hands and possession the sum of five pounds, of lawful money of Great Britain, of the monies of the said M. N. of and from the said M. N. under the aforesaid false colour and pretence, and also under colour and pretence of concealing

the said supposed crime, and for not prosecuting the said M. N. for the same, to the great damage of the said M. N. and against the peace, &c.

(*Second count.*) That the said A. B. and C. D. on, &c. with force and arms, at, &c. wickedly, unlawfully, and for lucre and gain sake, did threaten the said M. N. that unless he the said M. N. would give them the said A. B. and C. D. five pounds, they the said A. B. and C. D. would swear sodomy (meaning the detestable crime of sodomy called buggery) against him the said M. N. whereas in truth and in fact the said M. N. was never guilty of the crime of sodomy, or of any such crime; and that the said A. B. and C. D. afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, by means of the threatening aforesaid, unlawfully, wickedly, and injuriously did obtain, acquire, and get to themselves of and from the said M. N. five pounds, of lawful money of Great Britain, of the monies of the said M. N. (*i*). (*Conclusion as before.*)

287. *Indictment at common law, for a conspiracy among workmen to raise their wages, and lessen the time of labour (k).*

That A. B. &c. (*setting out their names and additions,*)

(*i*) Vide *Rex v. Rispal*, 3 Burr. 1320, and the indictment in Cro. Cir. Ass. 216. Vide also 30 Geo. II. ch. 24. s. 1.

(*k*) By stat. 2 & 3 Edw. 6. c. 15. s. 1. if any artificers, workmen, or labourers, do conspire, covenant, or promise together, or make any oaths, that they shall not make or do their works but at a certain price or rate, or shall not enterprise, or take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times, that then every person so conspiring, covenanting, swearing, or

offending, being lawfully convicted thereof, by witness, confession, or otherwise, shall forfeit for the first offence, ten pounds to the king's highness, and if he have sufficient to pay the same, and do also pay the same within six days next after his conviction, or else shall suffer for the same offence, twenty days imprisonment, and shall have only bread and water for his sustenance; and for the second offence shall forfeit twenty pounds to the king, if he have sufficient to pay the same, and also to pay the same within six days next after his conviction, or else shall suffer for the second offence punish-

on, &c. at, &c. being workmen and journeymen in the art, mystery, and manual occupation of a wheelwright, and not being content to work and labour in that art and mystery by the usual number of hours in each day, and at the usual rates and prices, for which they and other workmen and journeymen were wont and accustomed to work, but falsely and fraudulently conspiring and combining unjustly and oppressively to increase and augment the wages of themselves, and other workmen and journeymen in the said art, and unjustly to exact and extort great sums of money for their labour and hire in their said art, mystery, and manual occupation from their masters who employ them therein, with force and arms, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, together with divers other workmen and journeymen in the same art, mystery, and manual occupation (whose names to the jurors aforesaid are as yet unknown) unlawfully did assemble and meet together, and so being assembled and met, did then and there unjustly and corruptly conspire, combine, confederate, and agree, among themselves, that none of the said conspirators, after the same ——— day of ———, would make or do their work at any lower or lesser rate than five shillings for the hewing of every hundred of spokes for wheels, and eight shillings for making of every pair of hinder wheels, for or on account of any master or employer whatsoever in the said art, mystery, and occupation; and also that none of them the said conspirators would work day work or labour any longer than from the hour of six in the morning till the hour of seven in the evening in each day from thenceforth, to the great damage and oppression not only of their

ment of the pillory, and for the third offence shall forfeit forty pounds to the king, if he have sufficient to pay the same, and also do pay the same within six days next after his conviction, or else shall sit on the pillory, and lose one of his ears, and also shall at all times after that be taken as a man infamous, and his sayings, depositions, or oath, not to be credited at any time, in any matter of judgment.

s. 3. Justices of assize, justices of the peace, mayors, bailiffs, and stewards of leets, at all and every their sessions, leets, and courts, shall have full power and authority, to inquire, hear, and determine, all and singular offences, committed, against this statute, and to punish, or cause to be punished, the offender, according to the tenor of the statute. See the st. 39, 40 G. 3. c. 106.

masters employing them in the said art, mystery, and occupation, but also of divers others of his majesty's liege subjects, and against the peace, &c. (1).

288. Indictment for a conspiracy, and defrauding a person of fifty pounds, under pretence of procuring his son the office and place of deputy comptroller of the customs, in the port of Milford.

That A. B. late of, &c. esquire, and C. D. late of the same, yeoman, and E. F. &c. being evil disposed persons, and wickedly and unjustly devising and intending to defraud one J. W. of his monies, on, &c. with force and arms, at, &c. falsely, fraudulently, and unlawfully did conspire, combine, confederate, and agree among themselves to obtain, acquire, and get into their hands and possession of and from B. the wife of the said J. W. a great sum of money of him the said J. W. under a false colour and pretence of procuring for G. W. the son of the said J. W. and B. W. the office and place of deputy of the said A. B. as comptroller of his majesty's customs in his port of Milford, and the members and creeks thereunto belonging. And that the said A. B. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between him and the said C. D. and E. F. so as aforesaid before had, afterwards, to wit, on, &c. at, &c. falsely, fraudulently, unlawfully, and deceitfully did pretend to the said B. W. that he the said A. B. then had as comptroller of his majesty's customs, in the port of Milford aforesaid, and the members and creeks thereunto belonging, power and authority then and there to appoint the said G. W. to be his deputy, and that the said C. D. in pursuance of and according to the said conspiracy,

(2) An indictment may be drawn from this form on the statute, by pursuing the words of it, and concluding, "contrary to the form of the statute in such case made and provided."

See an indictment against several journeymen serge-weavers for refusing to work for a master who had employed a man

contrary to certain rules entered into by conspiracy, Cro. Cir. Ass. 204. See the provisions of the stat. 39 & 40 G. 3. c. 106. and the case of *R. v. Nield*, 6 East, 417.

See the *King* against the journeymen tailors of Cambridge, 8 Mod. Rep. 10. See the precedent below, p. 742.

combination, confederacy, and agreement between him and the said A. B. and E. F. so as aforesaid before had, did then and there fraudulently pretend and affirm to the said B. W. that he the said C. D. had power and authority, on behalf of the said A. B. to dispose of the said office and place of deputy to the said J. W. for the said G. W. his son, and that the said A. B. and C. D. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between them and the said E. F. so as aforesaid had, afterwards, to wit, on, &c, at, &c. by the false pretences aforesaid, and also under colour and pretence of a certain deputation, purporting to be under the hand and seal of the said A. B. and purporting that the said A. B. had thereby deputed and empowered the said G. W. to act and officiate for him the said A. B. as his deputy in the office, business, and employment of a comptroller of the customs at A. a member or creek belonging to the chief port of M. aforesaid, fraudulently and unlawfully did obtain, acquire, and get into their hands and possession, the sum of fifty pounds, of lawful money of Great Britain, of the monies of the said J. W. of and from the said B. W. that is to say, the said E. F. the sum of fifteen pounds, and the said C. D. the sum of thirty-five pounds; whereas in truth and in fact the said A. B. had not then any power or authority to appoint the said G. W. to be his deputy, or in any wise to depute or empower him the said G. W. to act and officiate for him the said A. B. as his deputy in the office, business, and employment of a comptroller of the customs at A. aforesaid, to the great damage of the said J. W. and against the peace, &c.

See the C. C. A. 190. also an indictment against several persons for conspiring to influence the prosecutor not to sell stock, but to buy more at an improper time, by false informations relative to a peace between England and France. *Ibid.* 206.

The stat. 33 Ed. 1. stat. 2. declares, that conspirators be they that do confederate or bind themselves by oath, co-

venant, or other alliance, that every of them shall aid and bear the other falsely and maliciously, to indite or cause to indite, or falsely to move or maintain, pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprizes;

lawful means they might unlawfully and unjustly obtain and acquire into their hands and possession the goods, chattels, and money, of the honest liege men and subjects of the said lady the queen, to maintain their dishonest and diabolical course of living, on, &c. at, &c. falsely, unlawfully, wickedly, and craftily contriving, intending, and conspiring, and devising among themselves to deceive and defraud one P. P. not only of his monies, but also to deprive him the said P. of his good name, fame, estate, and credit, and to bring the said P. into hatred, scandal, contempt, and infamy, amongst all the liege men and subjects of the said lady the queen, on, &c. at, &c. falsely, unlawfully, deceitfully, maliciously, and for the cause of wicked gain, conspired, contrived, consulted, and agreed amongst themselves, falsely, unjustly, wickedly, and diabolically, to charge and accuse the said P. P. to be the father of a child, whereof the said Elizabeth was then pregnant, as they then and there pretended; and by the conspiracy among them so as aforesaid before had, then and there, with force and arms, &c. they did falsely and maliciously affirm, and every one of them then and there did falsely and maliciously affirm that he the said P. then lately before had had carnal knowledge of the body of her the said Elizabeth, and had carnally known the said Elizabeth: and that he the said P. was the father of the pretended child, whereof the said Elizabeth then was pregnant, as she asserted and pretended; and for the further execution of the premises, they the said R. B., P. J., R. G., and Elizabeth C., then and there agreed and concluded amongst themselves, that he the said R. B. should go to the said P. and charge and accuse him the said P. that he the said P. then lately before had had carnal knowledge of the body of the said Elizabeth, and that he the said P. was the father of the said pretended child, whereof they pretended that she the said Elizabeth was pregnant. And the jurors aforesaid upon their oath aforesaid, further say, that the said R. B. in execution of the premises and according to the said conspiracy, consultation, and agreement among them the said R. B., P. J., R. G., and Elizabeth C. as aforesaid before had, afterwards, to wit, on, &c. and at divers other times, at, &c. falsely wickedly, maliciously, diabolically, and for the sake of wicked gain, in the hearing of many faithful liege men and subjects of the said lady the queen, charged and ac-

cused the said P. that he the said P. then lately before had had carnal knowledge of the body of the said Elizabeth C. and had carnally known her the said Elizabeth C. and that he the said P. was the father of the said pretended child, whereof they affirmed the said Elizabeth C. then was pregnant, to the great damage, &c. and against the peace, &c.

290. *Indictment against several for administering an unlawful oath (h).*

That A. B. late of, &c. labourer, C. D. &c. heretofore, to wit, on, &c. with force and arms, at Overhulton, in the county palatine of Lancaster, feloniously did administer and cause to be administered, to one H. B. a certain oath, then and there accordingly taken by the said H. B. which said oath was then and there intended to bind the said H. B. so then and there taking the same, *not to inform or give evidence* against any associate, confederate, or other person of or belonging to a certain association, society, and confederacy, the same then and there being a certain association, society, and confederacy of persons formed to disturb the public peace,* against the form of the statute, &c. and against the peace, &c.

(*2nd count.*) Feloniously did administer, and cause to be administered to the said H. B. a certain other oath, then and there accordingly taken by the said H. B.; which said last-mentioned oath was then and there intended to bind the said H. B. so then and there taking the same, *not to reveal or discover a certain combination and confederacy*, formed to disturb the public peace, against the form of the stat. &c. and against the peace, &c.

(*Third count.*) Feloniously did administer, and cause to be administered, to the said H. B. a certain other oath, then and there accordingly taken by the said H. B.; which said last-mentioned oath was then and there intended to bind the said H. B. so then and there taking the same, *not to reveal or discover ANY ILLEGAL ACT done by certain persons of and belonging to a certain association, society, and confederacy*, formed to disturb the

(h) Under the stat. 37 G. 3. c. 123. see p. 158.

public peace, against the form, &c. and against the peace, &c.

(*Fourth count.*) Feloniously did administer, and cause to be administered to the said H. B. a certain other oath accordingly taken, &c.; which said last-mentioned oath was then and there intended the said H. B. to engage to disturb the public peace, against the form of the statute, &c. and against the peace, &c.

(*Fifth, sixth, seventh, eighth counts.*) Were feloniously, aiding and assisting at, and present at, and consenting to the administering to the said H. B. a certain oath, &c. (as in the first, second, third, and fourth counts, respectively.)

Eight other counts, the same with the eight first, except that the word "*engagement*" is substituted for the word "*oath*."

291. *For taking an unlawful oath.*

(*Comm. as in pr. 1.*) Feloniously did take a certain oath, which said oath was then and there intended to bind the said A. B. so then and there taking the same not to inform or give evidence against any associate, confederate, or other person of and belonging to a certain association, society, and confederacy of persons formed to disturb the public peace, he the said A. B. not being compelled to take the said oath, against the form of the statute, &c. and against the peace, &c.

Add counts to correspond with the counts of the former precedent, subsequent to the first.

292. *Indictment against one for administering, and another for aiding at the administering, of an unlawful oath.*

(*As in pr. 290. to the *, and then proceed,*) and that J. B. late of, &c. labourer, was then and there feloniously aiding and assisting at, and present at, and consenting to the administering the said oath to the said I. C. against the form of the statute, &c.

Add counts to correspond with the counts of precedent 284, subsequent to the first (*a*).

(*a*) This case is within the stat. though the object of the conspiracy be to raise wages, and not to stir up mutiny and sedition. See 3 East. R. 157. *R. v. Marks and others.*

MISCELLANEOUS PRECEDENTS.

293. *Indictment for stealing goods and chattels belonging to overseers of the poor. (x)*

On, &c. at, &c. with force and arms, at the parish of Kingston, in the same county (y), six pounds weight of pork,

(x) By the stat. 55 G. 3. c. 137. s. 1. The property of and in all and singular the goods, chattels, furniture, provisions, clothes, &c. &c. had or to be had, bought, procured, or provided for the use of the poor of any parish or parishes, township or townships, is vested in the overseers of the poor of such parish, &c. *for the time being*, and their successors in office for the purposes of that act, who are thereby empowered to bring, or cause to be brought, any action or actions, or to prefer, or order the preferring of any bill or bills of indictment against any person or persons who shall steal, take or carry away, or buy or receive any such goods, &c. &c. And in every such action and indictment the said goods, &c. shall be laid or described to be the property of the overseers of the poor, for the time being, of such parish or parishes, &c. without stating or specifying the name or names of all or any such overseers.

(y) The above form of indictment was used in the case of *R. v. West*, who was tried before Burroughs, J. at Hertford.

The prisoner, at the time the felony was committed, was governor of the workhouse of the parish of Kingston; and it

was proved by witnesses, and by the confession of the prisoner, that he had committed a felony by stealing goods which were the property of the overseers at the time the felony was committed. The learned judge who tried the prisoner, on attending to the form of the indictment, doubted whether the indictment was not uncertain; inasmuch as it alleged that the stolen goods were the goods, chattels, and property of the overseers of the poor of the parish of Kingston, *for the time being*, and not that they were so at the time of the felonious stealing, taking, and carrying away the same. The prisoner was convicted, and the indictment was held to be good by all the judges.

By the stat. 1 G. 4. c. 111. reciting that, whereas, by an act made in the 56th year of the reign of his late Majesty, King George the Third, intitled an act for removing difficulties in the conviction of offenders stealing property from mines, it is among other things enacted, that it shall and may be lawful, and shall be deemed sufficient to all intents and purposes whatsoever, for the conviction of any offender or offenders charged in any indictment with grand or petty lar-

of the value of 4s. and divers (*specifying the goods and value*) of the goods, chattels, and property of the overseers of the poor *for the time being* (=) of the parish of Kingston aforesaid, then and there being found, feloniously did steal, take, and carry away, against the peace, &c.

294. *Information for a riot in Covent-Garden play-house, and preventing the acting of a play,*

That on, &c. and long before that time, G. C. esquire, and certain other persons, were the proprietors of a certain theatre, or play-house, situate in the parish of Saint Paul, Covent-Garden, within the city of Westminster, commonly called the theatre royal in Covent-Garden, otherwise Covent-Garden theatre, and then and there had lawful power, licence, and authority from time to time to shew, exhibit, and present tragedies, comedies, and plays within the said theatre, and to gather together, entertain, privilege, and keep such and so many players and persons, to act tragedies, comedies, and plays within the said the-

ciny, for or on account of stealing any materials, or any timber, iron, or other materials used in or for the working of mines, being the personal property of any company or adventurers carrying on the same, to allege and aver that the minerals, timber, iron, or other materials so stolen, are the property of some one or more of the partners or adventurers in such mining concern, and others his or their partners or adventurers, without naming such other partners or adventurers: and whereas the said enactment has been found to facilitate the conviction of offenders and to promote the due administration of justice, without depriving persons accused of any fair means of defence, Be it therefore enacted, by the king's most excellent

majesty, and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, the provisions of the said act, with respect to the offenders charged as in the said act is mentioned, shall be deemed and taken to extend to all cases of offenders charged in any indictment with burglary, felony, grand or petty larciny, or criminal breach of trust, committed on the goods, chattels, or personal property, of what nature soever, of any partners whatsoever, in as ample a manner as if they had been particularly specified in the said act.

(z) *Supra*, 729, note (y).

atre, as they should think convenient and necessary; and such persons to permit and continue, at and during the pleasure of the said proprietors, from time to time to act tragedies, comedies, and plays within the same, peaceably and quietly, without impeachment or impediment of any person or persons whatsoever, to wit, at Westminster aforesaid, in the said county of M. and the said coroner and attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed, That on, &c. C. M. gentleman, was a person who used and followed the profession of a player, or actor, and then was, and long before that time had been, privileged, kept, and retained as a player, or actor, in the way of his said profession, by the said G. C. on behalf of himself and the other proprietors of the said theatre, for and during a certain time not then expired, at and for a salary or reward therefore payable by them the said proprietors to the said C. M. and that the said C. M. then and for divers, to wit, thirty, years then last past, sought his living, and sustained himself and his family by his said profession and character of a player, or actor, and thereby gained and acquired sundry great gains, and a comfortable subsistence for himself and his family, to wit, at Westminster aforesaid, in the county aforesaid: and the said coroner and attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed, That on the said eighteenth day of November, in the year aforesaid, a certain old play, or comedy, called "The Merchant of Venice," was appointed by the said proprietors of the said theatre to be presented that day, at and in the said theatre, according to public notice thereof in that behalf given, and which said play or comedy, had for a long time, to wit, for ten years or more, before that time, been presented and performed in the said theatre; and that the said C. M. as such player, or actor, as aforesaid, was appointed by the said proprietors of the said theatre to play and perform a certain part, or character, in the said play, or comedy, called and distinguished by the name of "Shylock," and which said part, or character, in the said play, or comedy, the said C. M. had often before played and performed in the said theatre with great and public applause, to wit, at Westminster aforesaid, in the county aforesaid: and the said coroner and attorney of our said lord the king, who prosecutes as aforesaid, further gives the court here to understand and be informed, That T. L.

late of Westminster aforesaid, tailor; W. A. M. late of the same place, esquire; R. A. late of the same place, gentleman; J. S. J. late of the same place, esquire; and J. C. late of the same place, gentleman, being persons of riotous, turbulent, and evil dispositions, and unlawfully, wickedly, and maliciously conspiring together to ruin the said C. M. in his aforesaid profession of a player, or actor, and to deprive him of his said means of a livelihood, and to extort and procure his discharge from the said theatre by the proprietors thereof, with force and arms, on, &c. at Westminster aforesaid, in the county aforesaid, unlawfully, wickedly, riotously, and routously made and raised, and caused and procured to be made and raised, a great noise, tumult, riot, and disturbance, and thereby tumultuously and turbulently prevented and hindered the said C. M. from playing and performing the said part, or character, of Shylock, in the said play, or comedy, called "The Merchant of Venice;" and then and there wholly obstructed and prevented the performance of the said play, or comedy, there in the said theatre; and then and there also forced, compelled, and obliged the said G. C. then being one of the said proprietors of the said theatre, or play-house, and then and there being the acting manager thereof, against his will, to come upon the stage of the said theatre there, and for himself and the other proprietors of the same theatre then and there to discharge the said C. M. without his consent, and against his will, from his said retainer and employment of a player, or actor, at the said theatre, and wholly to dismiss him therefrom, against the will of the said G. C. and of the said other proprietors of the said theatre, to wit, at Westminster aforesaid, in the county aforesaid, in contempt of our said lord the king and his laws, to the manifest injury and ruin of the said C. M. in his said profession and way of livelihood, to the great loss and damage of the said proprietors of the said theatre, or play-house, to the total subversion of all good order in society, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown, and dignity.

Second count, for a riot in the play house, and preventing C. M. from acting.

Third count, alleges that C. M. was retained by the manager on behalf of the proprietors, and that the defendants made a riot, &c., and compelled the manager, &c. to discharge C. M.

Fourth count, that the proprietors retained C. M., and that the defendants made a riot, &c., and compelled them to dismiss him.

Fifth count, for a riot in the play-house and preventing the performance of a play. That the said T. L. W., A. M. R. A. J. S. J. and J. C. being persons of such riotous, turbulent, and evil dispositions as aforesaid, on the said eighteenth day of November, in the fourteenth year aforesaid, at Westminster aforesaid, in the county aforesaid, with force and arms, unlawfully, riotously, and routously assembled and gathered together at and in a certain other theatre, or play-house, situate in the said parish of Saint Paul, Covent-Garden, commonly called the theatre royal in Covent-Garden, and then and there made and raised, and caused and procured to be made and raised, a great noise, riot, tumult, and disturbance, there, in order to obstruct, prevent, and hinder, and for the purpose of obstructing, preventing, and hindering, the performance of the exhibition of the said play, or comedy, called the Merchant of Venice, in the said last-mentioned theatre, or play house, and which said play, or comedy, was appointed by the then proprietors of the said last mentioned theatre, or play-house, to be then and there acted and performed at and in the said last-mentioned theatre, or play-house, on that day, according to public notice thereof in that behalf given (they the said then proprietors of the said last-mentioned theatre, or play-house, then and there having lawful power, licence, and authority for that purpose); and that the said T. L. W. A. M. R. A. J. S. J. and J. C. did then and there with force and arms, unlawfully, tumultuously, riotously, and routously obstruct, prevent, and totally hinder the said play, or comedy, from being then and there acted and performed, at and in the said last-mentioned theatre, to wit, at Westminster aforesaid, in the county aforesaid, in contempt of our said lord the king, and his laws, to the great loss and injury of the said then proprietors of the said last-mentioned theatre, to the great subversion of all good order in society, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. Whereupon the said coroner and attorney of our said lord the king, who prosecutes as aforesaid, prays the consideration of the court here in the premises, and that due process of law may be awarded against them the said

T. L. W. A. M. R. A. J. S. J. and J. C. in this behalf, to make them answer to our said lord the king touching and concerning the premises aforesaid, &c. (k)

295. *Indictment for a riot, and breaking windows.*

(*As in pr. to the and then as follows.*) Did then and there unlawfully, riotously, routously tumultuously, violently, and outrageously make a great noise, disturbance, affray, near to, and about the dwelling house of one G. H. there situate, and did unlawfully, &c., stay and continue near to, and about the dwelling house of the said G. H. making such their noise, disturbance and affray for a long space of time, to wit, for the space of two hours, and during that time there did unlawfully, &c., shoot off a certain gun loaded with gunpowder and leaden shot, at and against the said dwelling house, and through certain windows parcel thereof, and thereby then and there not only greatly terrified and alarmed the said G. H. and his family, and disturbed and disquieted them in the peaceable and quiet possession, use, and occupation of the said dwelling house, but also then and there broke to pieces, shattered, and damaged the glass, to wit, twenty panes of glass of great value, then and there affixed and belonging to the said windows, and then and there, with loud and horrid oaths and imprecations, unlawfully, &c., menaced and threatened the said G. H., to shoot him through the body, and other wrongs to the said G. H. then and there unlawfully, &c. did to the great damage of him the said G. H. and against the peace, &c. (a)

(k) This form which seems to be unnecessarily prolix was used in a prosecution for raising a disturbance at a theatre, in order to procure the discharge of Mr. Macklin the actor. The defendants were convicted and fined. See a late case, 2 Campbell, 358. where it was held, that although the audience at a theatre have a right to express their disapprobation of any performance or actor, yet if a number of per-

sons go thither with intent to make a disturbance and render the performance inaudible, although they offer no actual violence to the house, or any person there, they will be guilty of a riot.

(a) In general an indictment will not lie for a mere trespass to land, houses, or goods, unless there be a riot or forcible entry. See 3 Burr. 1701 to 1703, 1706, 7, 1731, 3. 4 Wentworth 309, but the breaking the window of

296. *Indictment for a riot in a town, and for a nuisance in playing at foot-ball there.*

(*As in pr. to the .*) And being so assembled and met together did then and there wilfully kick, cast, and throw a certain foot-ball in and about the said town, near the dwelling-houses of divers liege subjects of our said lord the king, and also in divers streets and common highways there, to the great damage and common nuisance of all the liege subjects of our said lord the king residing in the said dwelling houses, and passing and re-passing in and along the said streets and highways, to the evil example, &c., and against the peace, &c. (n).

297. *Indictment for a nuisance, in erecting a furnace, &c.*

Did on, &c., at, &c., unlawfully and injuriously erect near the dwelling houses of divers liege subjects, and also near divers streets and common highways there, a steam-engine with a furnace for the burning of coals, &c. and did keep and continue the same so erected for a long space of time, to wit, from the day and year aforesaid, until the day of the taking of this inquisition, to wit, at, &c. and did during the whole of the time aforesaid, to wit, at, &c. burn and consume divers large quantities of coals in the said furnace, whereby, during the time aforesaid, at, &c. divers noisome and unwholesome smokes and smell from thence arose, so that the air was thereby greatly corrupted and infected, to the great damage and common nuisance of all the king's subjects, not only near the same place inhabiting and residing, but also through the said highways and streets passing, &c. (o).

a dwelling house, by firing a gun or throwing stones, especially if it be done in the night time, whilst the family is within, is an outrage attended with so much alarm and even danger to the family, that an indictment would it seems be maintainable for such an offence. In such a case, where a riot cannot be alleged, it would be pro-

per to allege, according to the fact, that the offence was committed in the night time and that the prosecutor and his family were within the house at the time.

(n) See 2 Chitty, Crim. Law, 494.

(o) *R. v. Dewsnap and others*, 16 East. The defendants were found guilty at the

298. *Indictment for keeping a disorderly house.*

On, &c., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at, &c. did keep and maintain and yet doth keep and maintain a certain common ill-governed and disorderly house, and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill-name and fame, and of dishonest conversation, to frequent and come together then and on the said other days and times, there unlawfully and wilfully did cause and procure; and the said persons in the said house, then and on the said other days and times, there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully and wilfully did permit and yet doth permit. To the great damage and common nuisance of all the subjects of our said lord the king inhabiting near the said house, and against the peace of our said lord the king his crown and dignity. (p)

299. *Indictment for usury.*

Middlesex to wit, the jurors for, &c. that A. B. late of &c. baker, after the twenty-ninth day of September, in the year of our Lord, 1714, to wit, on, &c. at, &c. unlawfully, usuriously, and corruptly, by way of corrupt bargain and agreement had and made between him and one C. D. took, accepted, and received, to the use of the said C. D. the sum of £10, of lawful, &c. of the proper money of the said C. D. for the loan of £315, of like lawful &c., lent and advanced by the said A. B. to the said C. D., and for forbearing and giving day of payment of the said sum of £315, for the space of half a year, to wit, from the 11th day of May, 1760, until and upon 11th November, A. D.

assizes; the indictment having been removed by certiorari, and the court held that the parties who dwelt near the place of the nuisance were parties grieved within the stat. 5 W. & M. c. 11. s. 3, and were entitled to have their taxed costs.

(p) *R. v. Higginson*, 2 Burr. R. 12. It was objected that the indictment was too general but the court held that the indictment was good, and discharged the rule to quash it, without argument, *vide supra*, 689.

1761, by means and in consequence of a corrupt agreement and bargain made at Westminster, aforesaid, after the said 29th day of September, 1714, to wit, on the 12th day of November, 1760, which said sum of 10l. so as aforesaid received and taken by the said A. B. for the forbearing and giving day of payment during the time aforesaid, did and doth exceed the rate of 5l. for the forbearance of 100l., for one year, to the great damage of the said C. D. against the form, &c. and against the peace, &c.

Another count leaving out the words in italics.

300. *Indictment for engrossing.*

On, &c. at, &c. did engross and get into his hands, by buying, on divers days and times, between the 20th of September, A. D. 1798, and the 1st day of January, A. D. 1800, divers large quantities of hops, to wit, of one T. W. a certain large quantity of hops, to wit, five hundred weight, (*and so of 25 other persons by names other quantities*) with intent and design to resell the said hops so by him engrossed and bought as aforesaid, for an unreasonable profit, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c.

(*2nd count.*) That the defendant, on the 10th of November, 1799, at Maidstone, &c. did engross and get into his hands a large quantity, to wit, 50 acres of hops, before that time planted, and then growing on certain lands of one J. A. by a certain forehand bargain, that is to say, by contracting with the said J. A. to buy and take of him the said J. A. and by persuading and procuring the said J. A. to contract, to sell, and deliver to him the said defendant at a certain large price, to wit, at the price of 10l. for each and every hundred weight of all the hops that should be grown by the said J. A. upon certain lands situate in the parish of St. Paul, in the said county, in possession of the said J. A. then planted with hops by the said J. A. with intent and design to resell the hops thereof coming, and every part and parcel thereof engrossed and bought as aforesaid, for an unreasonable profit, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c.

(*3d.*) That the defendant on divers days, &c. at, &c. did buy and cause to be bought, and did get into his hands a certain large quantity of hops, by buying of one

T. W. (and 27 others named therein) certain large quantities of hops (also specified), with intent to prevent the same from being brought to market for sale, and to resell the same for an unreasonable profit, and thereby greatly to enhance the price of hops, in contempt, &c.

(4th.) That defendant bought all the growth of hops on divers acres of land, situate in the several parishes of, (*naming the parishes*), by certain forehand bargains, viz. by bargaining with one T. S. (and 38 others named) to buy all the hops then growing or that should be growing in the then next season, on certain lands in the said several and respective parishes (*named*) at a certain large price, viz. at the rate of 10l. for every hundred weight, &c. with intent (*as in the last count.*)

(5th.) That the defendant bought and got into his hands by buying of T. W. (and 27 other persons named) a certain large quantity of hops (therein mentioned) with intent to resell the same for an unreasonable profit, and thereby greatly to enhance the price of hops.

(6th.) That the defendant bought all the growth of hops upon divers acres of land, situate in the several parishes of, &c. by certain forehand bargains, viz. by bargaining with T. S. (and 38 others named), at a certain large price, viz. 10l. for every hundred weight of the hops then grown or that should be grown in the next season upon the said lands, with intent to resell the hops thereof coming for an unreasonable price, and thereby greatly to enhance the price, &c.

(7th.) That the defendant unlawfully endeavoured to promote and enhance the price of hops, by persuading and attempting to persuade divers persons dealing in hops, and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt, &c.

(8th.) That defendant between the 2nd of September, 1798, and the 1st of May, 1800, did unlawfully engross and get into his hands, by buying of divers persons unknown, divers quantities, amounting to 2000 tons of hops, with intent to resell the same at an exorbitant profit, and thereby greatly to enhance the price of hops.

The 9th count was the same as the last, only omitting the charge of engrossing, and confining it to a buying.

(10th.) That the defendant between, &c. and, &c. bought of divers persons unknown, the growth of divers, viz. 2000 acres of hops then growing upon 2000 acres of land, situate in the several parishes (*named*) at a large price, viz. at

the rate of 10l. for every hundred weight of hops that should be grown upon the said land, with intent to resell the hops thereof coming for an exorbitant price and lucre, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c. (q.)

301. *Indictment under the stat. 57 G. 3. c. 90. for destroying game, &c. at night.*

That C. D. late of the parish of M. in the county of L. labourer, heretofore, to wit, on the 10th day of November, in the — year of the reign, &c. did with force and arms enter into a certain wood (or *open close* or (r) *plantation*, &c. as the case may be) of A. B. (s) situate and being, in the parish of M. (t) in the said county of L. with the intent illegally to take and destroy (u) game there, and that the said C. D. having so entered into the said wood (r), with the illegal intent aforesaid, and being therein with that intent, was afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, found in the said wood at night, that is to say, between the hours of six in the evening of the said 10th day of November and seven in the morning of the 11th day of November, in the year aforesaid, to wit, about the hour of 11 in the night of the said 10th day of November, armed with a gun (x) (or with *a certain offensive weapon, to wit, a cutlass*, as the case may be), against the form of the sta-

(q) This was the form of indictment used in Waddington's case. 1 East. Rep. 166. after conviction upon which he received judgment of fine and imprisonment. See 3 Inst. 195, 6. 1 Haw. c. 98. s. 3. 5 & 6 Ed. 6. c. 14. s. 3. Hadham's case, 3 Inst. 97, vide supra, 681.

(r) It may be prudent to describe the place differently in different counts.

(s) The name of the occupier.

(t) The description of the parish must be correctly given.

(u) This allegation must of

course correspond with the fact, if there be reason to apprehend that the object was to take but not to destroy, the words *and destroy* should be omitted in one count at least.

(x) The case is within the statute, although the arms have been thrown away previous to the apprehension. *R. v. Nash and Weller*, Cor. Bayley, J. Maidstone Spring Ass. 1819, and it is sufficient if one be armed with the knowledge of the rest. Starkie on Evidence, Pt. IV. 632.

tute in such case made and provided and against the peace, &c.

302. *For ill-treatment of a servant.*

That E. R. late of ———, widow, unlawfully and maliciously contriving and intending to hurt and injure one E. W. being a servant to her the said E. R. and being an infant of tender years, to wit, of the age of ——— years, and being also under the dominion and controul of her the said E. R. (x) on, &c. and on divers other days and times as well before as after that day, with force and arms, at, &c. unlawfully, maliciously, and wilfully did omit, neglect, and refuse to provide for and give and administer to the said E. W. being her servant as aforesaid, wholly under her dominion, power, and controul as aforesaid, during all the time aforesaid, sufficient meat and drink necessary for the sustenance, support, and nourishment of the body of her the said E. W. and did expose her the said E. W. so being such servant as aforesaid, to the cold and inclemency of the weather, as well within as without the house of her the said E. R. and keep the said E. W. without sufficient and proper warmth necessary to the health of her the said E. W. being such servant as aforesaid, she the said E. W. being then and there and during the whole of the time aforesaid, under the dominion, power, and controul of her the said E. R. as aforesaid (x), contrary to the duty of her the said E. R. as the mistress of the said E. W. By reason of all which premises she the said E. W. on, &c. became and was and for a long time, to wit, the space of six months then next following, continued to be very weak, sick, and ill, and greatly consumed and emaciated in her body, to wit, at, &c. to the great damage of the said E. W. in contempt of our said lord the king and his laws, to the evil example of all others, and against the peace of our said lord the king, his crown, and dignity.

(x) This allegation is essential, see *R. v. Ridley*, 3 Camp. 650. cor. Lawrence, J. Salop, 1811. where an indictment omitting it was held to be insufficient.

The same point was determined by a majority of the judges in a case reserved by Le

Blanc, J. from the Exeter Spring Assizes, 1802. An indictment against a master chimney-sweeper for manslaughter by omission, &c. was held by Garrow, B. to be insufficient in not averring that the prisoner had the means of preventing the death. O. B. Dec. 1817.

303. *For carrying a child infected with the small-pox along a public highway (a).*

That on the 20th day of April, in the 54th year of, &c. John Vantandillo, an infant of about the age of one year, was infected with a contagious, infectious, and dangerous disease and sickness, called the small-pox, at, &c.; and that A. V. late of, &c. being the mother of the said J. V., and well knowing the premises (b), afterwards and whilst the said J. V. was so infected, on, &c. with force and arms, at, &c. unlawfully and injuriously did take and carry the said J. V. into and along a certain open public way and passage there, called, &c. used for all the king's subjects on foot, in which public way and passage there were then and there divers liege subjects, and near unto and by divers dwelling houses, habitations, and residences of divers liege subjects then and there dwelling, inhabiting, and residing, and into a common highway, situate in, &c., used for all the king's subjects on foot, and with horses, coaches, carts, and carriages, to pass and repass, ride, and labour, at their free will and pleasure, in and along which said common highway divers liege subjects were then going, returning, passing, riding, and labouring, and amidst and among divers liege subjects, who were then and there in the said common highway, and had met and assembled together, to the great danger of infecting, with the said contagious, infectious, and dangerous disease and sickness called the small-pox, all the liege subjects of our said lord the king, who, on the said days and times, were in and near the

(a) This form was used in the case of *R. v. Vantandillo*, 4 M. & S. 73. and the defendant, the court having refused to arrest the judgment, was sentenced to an imprisonment of three months. There were other counts in the indictment. It was objected that the indictment ought to have alleged that there was some sore upon the child, and to have shown that the act was unlawful. But the court held that it was clearly a misdemeanor to expose a

person labouring under such an infectious disorder; that if the exposure had been at all warranted, on the ground of necessity, the fact might have been proved by way of defence upon the trial, but that the allegation that the act was unlawfully and injuriously done, rebutted such a presumption. See Hales P. C. 432. Haw. P. C. c. 52, 53. 3 Atk. 750.

(b) This allegation is necessary; vide supra, 165. Andr. 162.

said public way and passage, dwelling houses, habitations, residences, and common highway, and who had not had the said disease and sickness, to the damage and common nuisance of all the said liege subjects, to the evil example of all other persons in like cases offending, and against the peace, &c.

304. *For exercising a trade without having served an apprenticeship, against the statute.*

That A. B., late of, &c. labourer, on the 10th day of January, in the 5th year of the reign of the late Queen Elizabeth, and so forth, did not lawfully use or exercise any art, mystery, or occupation, within England or Wales, yet that the said A. B., afterwards, to wit, on the 1st January, in &c. and continually afterwards, until, &c. for the space of ten whole months and upwards, then next following, at, &c. for his own lucre and gain, did set up, use, and exercise the art, mystery, and manual occupation of a baker, being an art, mystery, and manual occupation used in England, on the said 10th day of January, in the 5th year of the reign of the said late Queen Elizabeth, in which same art, mystery, and manual occupation of a baker, the said A. B. was not brought up for the space of seven years as an apprentice, against the form of the statute, &c., and against the peace, &c.

305. *Against workmen for a conspiracy to raise their wages (c).*

That the defendants, with divers other evil-disposed

(c) *R. v. Ferguson and Edge*, 2 Starkie's C. 489. The defendants had judgment of fine and imprisonment in the King's Bench, Mich. 59 G. 3. It appeared on evidence at the trial, that the conspiracy was to prevent the masters from taking a number of apprentices exceeding half the number of workmen, and it was objected that it ought to have been so alleged; but the court held, that the indictment was sufficiently proved.

See another form, *supra*, p.

720. and see the notes, p. 707. In the case of *R. v. Gill and Henry*, 2 B. & A. 204., it was held, that an indictment, which charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, was sustainable. That it was quite sufficient to state the fact of the conspiracy and its object, without stating the specific particulars.

persons, to the jurors unknown, on, &c., and on divers other days and times next following, in, &c., at, &c., being journeymen and workmen in the trade, mystery, and manual occupation of engravers, in the employment of Samuel Davenport and Robert Fayle, did conspire, combine, confederate, and agree together, to prevent, hinder, and deter their said masters and employers from retaining and taking into their employment any person as an apprentice, to be taught and instructed in the said trade, mystery, and occupation, to the great damage of their said masters and employers, to the evil example of all others in the like case offending, and against the peace, &c.

Second count. That the defendants, together with other ill-disposed persons, afterwards, to wit, on, &c., at, &c., being such journeymen and workmen as aforesaid, in the employment of the said S. D. and R. F., maliciously intending to hurt, injure, and impoverish their said employers, and to prevent them from retaining any other journeymen and workmen, and retaining and instructing apprentices in the said occupation, did conspire, combine, confederate, and agree to quit, leave, and turn out from their said employment at one and the said time together, to the great damage, &c.

Third count. That the defendants, together with the said other evil disposed persons, afterwards, to wit, on, &c. at, &c., being such journeymen and workmen as aforesaid, in the employment of the said S. D. and R. F., maliciously intending to controul, injure, terrify, and impoverish their said employers, and to force and compel them to dismiss from their employment, divers persons then and there retained by them as journeymen, workmen, and apprentices therein, unlawfully did conspire, combine, confederate and agree to quit, leave, and turn out from their said employment until the said last mentioned journeymen, workmen, and apprentices should be dismissed by their said masters and employers, to the great damage, &c.

306. *For a conspiracy to charge a parish with the maintenance of an infant child, by dropping it in the parish, with a count for exposing the child, &c.*

London to wit. The jurors for our lord the king, upon their oath present, that Eliz. Pugh, late of London, widow, and Thomas Pugh, late of the same place la-

bourer, being wicked and evil disposed persons, and wickedly and maliciously intending and devising to injure the inhabitants of that part of the parish of St. Andrew Holborn which is situate in London, aforesaid, and which inhabitants are, and are by law liable to be, taxed and rated for the relief of the poor of the same part of the said parish, separate and apart from the inhabitants of the other part of the said parish, which other parts are situate in the county of Middlesex, heretofore to wit, on the 24th day of August, in the 49th year of the reign of our present sovereign lord George the Third, by the grace, &c. at London aforesaid, to wit, at the said part of the said parish, which is situate in London, in the ward of Farringdon without, did between themselves, and together with divers other ill-disposed persons whose names are to the said jurors at present unknown, wickedly and maliciously conspire, combine, consult, consent, and agree to charge the inhabitants of the said last mentioned part of the said parish with the support and maintenance of a certain female infant child, (whose name is to the said jurors at present unknown,) the said infant child then and there being of very tender years, to wit, of the age of one year and eleven months, and being poor and impotent and not able to maintain or provide for herself, and also not being legally settled in the said last mentioned part of the said parish. *And that, in pursuance of the said unlawful combination and conspiracy, they the said Elizabeth Pugh, and Thomas Pugh, afterwards, to wit, on the 29th day of August, in the 49th year of the reign aforesaid, at London aforesaid, to wit, at that part of the parish of St. Andrew, Holborn, aforesaid, which is situate in London aforesaid, in the ward of Farringdon Without aforesaid, with force and arms, secretly and clandestinely, unlawfully and wickedly, did take and convey the said infant child, from a certain other parish, to wit, the parish of St. Stephen, into the said last mentioned part of the said parish of St. Andrew, Holborn, whereby the inhabitants of the said last mentioned part of the said parish of St. Andrew, Holborn, have been put to great costs and charges of their monies in the maintaining, feeding, and keeping the said infant child, to wit, at L. aforesaid, in the said last mentioned part of the said parish of the ward of F. aforesaid, they the said E. Pugh and T. Pugh, and the said other evil-disposed persons, whose names are to the said jurors unknown.*

then and there, at the several times aforesaid, well knowing the said infant child to be poor and impotent and unable to provide for or maintain herself, and not to be legally settled in the said last mentioned part of the said parish of St. Andrew, Holborn, to the great damage of the inhabitants of the said last mentioned part of the said parish of St. Andrew, Holborn, to the evil, &c.

Second count charging the conspiracy only.

(Third count.) And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. P. and T. P. being such wicked and evil-disposed persons as aforesaid, and again wickedly and maliciously intending and devising to injure the inhabitants of the said part of the said parish of St. A. H. which is situate in L. and which said inhabitants are, and are by law liable to be, taxed and rated for the relief of the poor of the same part of the said parish, separate and apart from the inhabitants of the other parts of the said parish, of St. A. H. and which are situate in the county of Middlesex, and also to charge the inhabitants of the said part of the said parish of St. A. H. which is situate in London, with the support and maintenance of a certain other female infant child (whose name is to the jurors at present unknown) the said last mentioned infant child then and there being of very tender years, to wit, of the age of one year and 11 months, and being poor and impotent and not able to maintain or provide for herself, and also being unable to declare or make known the place of her birth or legal settlement, or the place from whence she came, or the name or names of her parent or parents, or of any person or persons by law bound and liable to provide for and support the said infant child last mentioned, did afterwards, to wit, on the 24th day of August, in the 49th year of the reign aforesaid, at L. aforesaid, to wit, at that part of the parish of St. A. H. which is situate in L. aforesaid, in the ward of Farringdon-without aforesaid, with force and arms, secretly and clandestinely, unlawfully and wickedly take and convey the said last-mentioned infant child from a certain other parish, to wit, the parish of St. Stephen, Colman-street, in the city of L. into the said last-mentioned part of the said parish of St. A. H. to wit, to a certain place in the said last-mentioned part of the said parish of St. A. H. called Castle Street, and then and there secretly and clandestinely place, lay down and leave, expose and desert the said last-mentioned infant child, in the said last-

mentioned part of the said parish of St. A. H., whereby the inhabitants of the said last-mentioned part of the said parish of St. A. H. have been put to great costs and charges of their money in and about the maintaining, feeding, and keeping the said last-mentioned infant child, to wit, at L. aforesaid, in the said last-mentioned part of the said parish of St. A. H. in the ward aforesaid, they the said E. P. and T. P. then and there at the several times aforesaid, well knowing the said last-mentioned infant child to be poor and impotent and not able to maintain or provide for herself, and also to be ignorant of and unable to declare and make known the place of her birth or legal settlement or place from whence she came, or the name or names of her parent or parents, or of any person or persons by law bound and liable to provide for or support her the said infant child last-mentioned, to the great damage of the inhabitants of the last-mentioned part of the said parish of St. A. H. to the evil, &c.

(*Fourth count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. P. and T. P., being such evil-disposed persons as aforesaid, afterwards, to wit, on, &c. with force and arms, at, &c. in and upon a certain female infant child (whose name is to the said jurors at present unknown), the said last-mentioned infant child then and there being of very tender years, to wit, of the age of one year and eleven months, in the peace of God and our said lord the king, then and there being, did make an assault, and the said last-mentioned infant child then and there did beat and ill-treat and her the said last-mentioned infant child then and there did secretly, clandestinely, unlawfully, wilfully, and wickedly carry and convey to and place, lay down, leave, expose, and desert in an open street there, at a lonely and unseasonable hour of the night, to wit, at the hour of 10 in the night, and did then and there abandon and expose the said last-mentioned infant child to the cold and unwholesome air of the night, and other wrongs to the said last-mentioned infant child, they the said E. P. and T. P. then and there did, to the great damage of the said last-mentioned infant child, and to the great danger of her health and life, and against the peace, &c.

307. *For procuring the marriage of paupers in order to charge a parish, the offence not being laid as a conspiracy (a).*

That on, &c. and long before, one W. C. was a poor single man and unable to maintain himself and a wife, and that the place of the legal settlement of the said W. C. on the said, &c. and long before was, and ever since hitherto hath been, and still is, in the parish of C. in the said county of O. and that one L. B., now the wife of the said W. C., on the same day and year aforesaid and long before, and continually from thence until the marriage of the said L. B. with the said W. C. hereinafter mentioned, was a poor single woman legally settled and actually chargeable to the parish of B. in the said county of O., and the jurors aforesaid, upon their oath aforesaid, do further present, that J. C. late of the said parish of B. in the said county of O. yeoman, then and there being an inhabitant of the said parish of B. and also an overseer of the poor of the said last-mentioned parish, well knowing the premises, but unlawfully, wickedly, and wrongfully devising, designing, and intending to exonerate, free, and discharge himself and the parishioners and inhabitants of the said parish of B. in the said county of O. from the charge and expense which might ensue to the parishioners and inhabitants of the said parish of B. from the said L. B., as a poor person, and then having a legal settlement in the said parish of B., and unjustly to oppress and aggrieve the parishioners and inhabitants of the said parish of C. in the said county of O. and wrongfully and unjustly to charge and burden the parishioners and inhabitants of the said parish of C. with the maintenance and support of the said L. B., on, &c. with force and arms, at, &c. unlawfully and wickedly did devise and contrive and did willingly act and assist in the devising and contriving a marriage to be had and solemnized between the said W. C. and the said L. B., and did then and there entice, excite, and instigate, and endeavour to move, procure, and persuade the said W. C. to intermarry with and take to wife the said L. B., and that the said J. C. afterwards, to wit, on, &c. at, &c.

(a) Vide supra, 711.

the better and more effectually to complete and perfect the said wicked contrivance and intention, and to cause and procure the said W. C. to intermarry with and take to wife the said L. B., did then and there promise the said W. C. that he the said J. C. would pay for a license and all expenses attending the solemnization of the said intended marriage between him the said W. C. and the said L. B., and also that he the said J. C. would give him the said W. C. and L. B. bedding, if the said W. C. would marry and take to wife the said L., and did then and there give and deliver to the said L. divers articles of covering, apparel, and bedding, to wit, —, and did also then and there pay a large sum of money, to wit, —l. for a license for the solemnization of a marriage between the said W. C. and L. B. by means of which said premises he the said W. C. was then and there persuaded to consent, and did then and there consent and agree to marry the said L. B., and did afterwards, to wit, on, &c. by the persuasion and procurement of the said J. C. marry and take to wife the said L. B. And the said W. C. at and after the time of the said marriage, being a poor person as aforesaid, and not having a legal settlement in the said parish of B. but having a legal settlement in the said parish of C.; and the said L. B. at the time of the said marriage being a poor person, and having a legal settlement in and being chargeable to the said parish of C., by colour and means of the said marriage, the said inhabitants and parishioners of the said parish of C. for a long time, to wit, ever since the solemnization of the said marriage until the day of the taking this inquisition, have been put to great charges and expenses, amounting in the whole to a large sum, to wit, &c. in and about the necessary maintenance and support of the said W. C. and L. the wife of the said W. C., and of a certain infant child of the said L. the wife of the said W. C. born since the solemnization of the said marriage, to keep them from starving, and are likely to be put to great trouble and expense in and about the maintaining and supporting the said L. the wife of the said W. C., and the said child, the said W. C. and L. his wife being unable to maintain and support themselves and the said child, to the great damage and grievance of the said inhabitants and parishioners of the said parish of C., to the evil, &c.

308. *Information for persuading a soldier to desert (b).*

(*Commencement as in precedent 9.*) That Elizabeth Stonefield, late of Liverpool, in the county of Lancaster, widow, within six months now last past, to wit, on the 31st day of May, in the 49th year, &c. at L. aforesaid, in the said county of L. did directly and indirectly persuade and procure one Wm. Lawrence, being a soldier in the service of our said lord the king, to desert and leave the said service of our said lord the king, in contempt, &c. to the evil, &c. against the form of the stat., &c. and against the peace, &c.

(*2nd count.*) And the said A. G. of our said lord the king, for our said lord the king, further giveth the court here to understand and be informed, that the said E. Stonefield not being a person enlisted as a soldier (c) but well knowing one Wm. Lawrence to be a soldier in the service of our said lord the king, and again minding and intending to injure and prejudice the said service of our said lord the king, afterwards, to wit, on, &c. at, &c. did by words and promises directly and indirectly go about and endeavour to persuade, prevail on, and procure the said W. L. so being such soldier as aforesaid; to desert and leave the said service of our said lord the king, in contempt, &c. to the evil, &c. against the form, &c. and against the peace, &c.

309. *For digging up and carrying away a dead body out of a church-yard (d).*

On, &c. with force and arms, at, &c. aforesaid, the

(b) See the st. 48 G. 3. c. 15. s. 118. and 47 G. 3. st. 1. c. 32. s. 114. and vide supra. 677.

(c) Qu. whether necessary.

(d) That the offence is indictable as a misdemeanor at common law, see *R. v. Lynn*, 2 T. R. 733. 2 East. P. C. 652. 1 Hale, 515. 2 Comm. 429.

An indictment will also lie for a conspiracy to prevent a burial. See 2 T. R. 734. in which it may be alleged that the parties did conspire, contrive, &c. to cause and procure the dead body of one M. N., then deceased, to be taken away from the workhouse for the poor of the

church-yard of and belonging to the parish church of the same parish there situate, unlawfully, voluntarily, and wilfully, did break and enter, and the grave there, in which one A. B. deceased had lately before then been interred and then was, with force and arms, unlawfully, voluntarily, wilfully, and indecently did dig open, and afterwards, to wit, on the same day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, the body of her the said A. B. out of the grave aforesaid, unlawfully, voluntarily, wilfully, and indecently did take and carry away, to the great indecency of christian burial, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown, and dignity.

310. *Against a tithing-man for permitting persons to light fireworks at his dwelling-house and carry them into a public street and there discharge them (s).*

That on, &c. R. G. late of, &c. was a tithing man of the said borough and town, duly nominated, appointed, and sworn, and that the said R. so being such tithing-man, but disregarding the duty of his said office, did on the day and year aforesaid, at the town and borough aforesaid, unlawfully permit and suffer certain persons, to the said jurors unknown, to light and set on fire certain squibs and fireworks in the dwelling-house of him the said R. situate and being within the town and borough aforesaid, and within the jurisdiction aforesaid, and did also then and there unlawfully permit and suffer the said persons to carry the said squibs and fireworks, so being lighted and set on fire from and out of the said dwelling-house, into a certain

said parish of ——. Wherein the said M. N. had been kept and maintained, whilst living as a poor and impotent person, unable to provide for himself, and wherein the said M. N. had died, with intent that the said dead body should be dissected, &c. and to hinder and prevent the interment and burial

of the said dead body, according to the rites and ceremonies of the established church of England. See the form 4 Wentw. 219. An information was granted against a rector for refusing to bury a poor parishioner. See Willes, 518. 2 Chitty's Crim. p. 35.

common and public street at the town and borough aforesaid, and within the jurisdiction aforesaid, with intent that the said persons might then and there unlawfully and unjustly, and against the form of the statute in such case made and provided, cast, throw, and discharge the said squibs and fireworks in the said common and public street; and that the said persons did then and there, by means of the said permission and sufferance, unlawfully and unjustly, and against the form of the statute in such case made and provided, cast, throw, and discharge the said squibs and fireworks in the common and public street aforesaid, to the great terror and common nuisance of all the liege subjects of our said lord the king, residing, inhabiting, and being in or near to the said town and borough, to the evil, &c. and against the peace, &c.

(*Second count.*) That the said R. so being such tithing-man as aforesaid, but disregarding the duty of his said office, did, on, &c. at, &c. and within the jurisdiction aforesaid, with force and arms, unlawfully aid and assist certain persons, to the said jurors unknown, to cast, throw, and fire divers squibs and fireworks in a certain common and public street, in the town and borough aforesaid, and within the jurisdiction aforesaid, and that the said last-mentioned persons did then and there, by means of the said aid and assistance of him the said R. cast, throw, and fire the said last-mentioned squibs and fireworks in the said last-mentioned street, to the great terror and nuisance of the inhabitants of the said town and borough, to the evil example, &c. and against the peace, &c.

(*Third count.*) That the said R. G. on, &c. at, &c. and within the jurisdiction aforesaid, with force and arms, unlawfully did assist in the casting, throwing, and firing divers squibs and fireworks in a certain common and public street there in the town and borough aforesaid, and within the jurisdiction aforesaid, to the great terror and nuisance of the inhabitants of the said town and borough, to the evil, &c. against the form, &c. and against the peace, &c.

311. *Indictment against a bailiff for extortion in levying under a writ of fieri facias.*

That J. L. late of, &c. yeoman, on, &c. the said J. L. being then one of the bailiffs of the sheriff of, &c. at, &c.

unlawfully, unjustly, and extorsively, and by colour of his said office, did extort, receive, and have, of and from one J. C. the elder, the sum of 3l. 3s. of lawful money, &c. for the fee of him the said J. L. for the levying the sum of 36l. 15s. on the goods and chattels of the said J. C. by virtue of a certain writ of our said lord the king, called a *feri facias*, issued out of the court of our said lord the king of the bench, upon a judgment some time before recovered in the said court, against the said J. C. at the suit of J. P. esq., in an action of debt, whereas, in truth and in fact, no such fee as 3l. 3s. was then due to the said J. L. from the said J. C., nor ought to have been received of him the said J. C. for executing the said writ, called a *feri facias*, on the goods and chattels of the said J. C. in manner and form aforesaid, to the great damage of the said J. C., to the evil example of all others in the like case offending, and against the peace, &c. (f)

312. *For obtaining money by falsely pretending that a letter had been overcharged.*

That C. T. of, &c. labourer, being an ill-disposed person, and contriving and intending unlawfully to cheat and defraud one M. N., (he the said M. N. being the deputy postmaster of and for B. aforesaid,) of his money, for the support of his the said C. T.'s profligate mode of life, on, &c. at, &c., with force and arms, unlawfully, knowingly, designedly, and falsely did pretend and affirm, to one I. B. S. then and there being a clerk and servant to the said M. N., then and there being such deputy postmaster as aforesaid, that a certain letter, then and there produced and shewn to the said I. B. S. by the said C. T. theretofore sent by the post to one W. W., and being a single letter, had been improperly charged to and paid by the said W. W. as a double letter. And that he the said C. T. had come to ask and receive for and on the behalf of the said W. W. one half of the rate and amount of the postage so improperly charged to and paid by him the said

(f) See 1 Keb. 357. 2 to the allegations, *supra* 149, Lev. 268. 25 Ed. 3. st. 2. c. 9. 150, &c. *Supra* 610 & sequent. and as

W. W. for the said letter. And that he the said I. B. S. giving confidence to the said pretence and assertion of the said C. T. and believing the same to be true, did then and there pay and deliver to the said C. T. a certain sum of money, to wit, the sum of seven pence of lawful money of G. B. of the money of the said M. N., the said sum of money then and there being one half of the rate and amount of the postage so by the said C. T. pretended and asserted to have been improperly charged and paid for the said letter, and the said C. T. did then and there, by the said false pretences (g), unlawfully, knowingly, and designedly, obtain from the said I. B. S. a large sum of money, to wit, the sum of seven pence of like lawful money of the money of the said M. N., with intent then and there to cheat and defraud the said M. N. of the same, whereas, in truth and in fact, the said letter had not been charged or paid for as a double letter. And whereas, in truth and in fact, the said C. T. was not sent by nor came for and on the behalf of the said W. W. to ask or receive any money for or on account of any charge or overcharge for or relating to the postage of the said letter, to the great damage and deception of the said M. M., in contempt, &c. to the evil example, &c. against the form, &c. and against the peace, &c.

Second, third, fourth, fifth, sixth, and seventh counts for different sums and on different days.

(*Eighth count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on, &c. at, &c. the said C. T. had in his custody and possession a certain other letter, theretofore sent by the post for and delivered to the said W. W., for which said last-mentioned letter, as being a single letter, the sum of seven pence of lawful money, and no more had been charged to and paid by the said W. W., as the postage thereof; and that upon the outside of the said last-mentioned letter was then and there written the figure 7, as a post mark, denoting the sum of seven pence of lawful money, the charge and postage of such letter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. T. devising and intending to cheat and defraud *our said*

(g). These words were not in the original, but seem to be necessary.

lord the king of his monies, afterwards, to wit, on, &c. with force and arms, at, &c. unlawfully and fraudulently did write, forge, and counterfeit, and caused to be written, forged, and counterfeited, on the outside of the said last-mentioned letter, the mark and figures following, that is to say, 1s. 2d. as and for a post mark, to denote and represent that the sum of 1s. 2d. was and had been charged for the said last-mentioned letter as the postage thereof, and did then and there unlawfully and fraudulently make, forge, and counterfeit, and cause to be made, forged, and counterfeited, on the outside of the said last-mentioned letter, a certain note and memorandum in writing, as follows, that is to say, "This I received single, charged double, W. W." And which said false, forged, and counterfeited note and memorandum was then and there meant and intended to be, and to be esteemed a declaration and allegation by and on the part of him the said W. W. that he the said W. W. had received the said last-mentioned letter a single letter, and that the same had been charged to him with the rate of postage of a double letter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. T. afterwards, to wit, on the same day and year aforesaid, at, &c. did unlawfully and fraudulently utter and publish as true the said false, forged, and counterfeit mark, figures, note, and memorandum in writing, with intent and in order to obtain and receive to his the said C. T.'s own use the sum of seven pence, as and for a return of overcharge of postage upon the said last-mentioned letter, in contempt, &c.

313. *For obtaining money by falsely pretending that the prisoner was the person mentioned in an order for money sent by the post (g).*

Town of Nottingham and county of the same town, to wit,

(g) Story, the defendant in the above indictment, was a hawker, and, being at Nottingham, inquired at the post-office for letters directed to him. A letter directed to John Storer was by mistake of the name delivered to him. This letter contained an order from the

postmaster at another place to the postmaster of Nottingham for one pound to John Storer. The defendant took away the letter, and in a few minutes returned to the office and presented the order for payment, and wrote his own name, John Story, as an ac-

the jurors for our lord the king, upon their oath present, that John Story, late of the town of Nottingham, and county of the same town, labourer, being an evil disposed person, and not minding to gain his livelihood by truth, and honest labour, on the 5th day of August, in the 44th year of the reign of, &c., &c., with force and arms, at the parish of St. Mary, in the town of Nottingham, falsely, fraudulently, and deceitfully, did produce and deliver to Elizabeth, the wife of John Rayner, (he the said John Rayner, then and there being employed in the business of the post office, as deputy post master, of and for the said town of Nottingham,) a certain order for payment of money commonly called a money order, to wit for the payment of the sum of £1, to one John Storer, and did then and there unlawfully, knowingly, and designedly, falsely pretend to the said Elizabeth Rayner, that he the said John Story was the person named in the said order. By means of which said false pretence, he, the said John Story, did then and there unlawfully, knowingly, and designedly, obtain of and from the said Elizabeth Rayner, the sum of one pound, of lawful money of Great Britain, of the monies of the said John Rayner, with intent then and there to cheat and defraud the said John Rayner of the same, whereas, in truth and in fact, he, the said John Story, was not the person named in the said order nor the person entitled to receive the money therein mentioned, to the great damage of the said John Rayner, to the evil example, &c., against the form of the statute, &c., and against the peace, &c.

Second count same as the first, with intent to defraud John Storer.

knowledgment of the receipt of the money which was paid to him, without discovering his mistake, but *said nothing*. The majority of the judges thought the conviction good.

It is said that Rooke, Lawrence, and Chambre, thought the defendant guilty of larceny in taking the order from the letter, and converting it to his own use.

314. *Indictment against a prisoner for obtaining money by falsely pretending that his name was Reeve, of the Alien Office, and that an information had been laid there against Mrs. A.; that the informer was entitled to £40, and that she must pay £10 to get off.*

That Joseph Heath, late of the parish of St. James, Westminster, in the county of M. labourer, being an evil disposed person, and contriving and intending, unlawfully, fraudulently, and deceitfully, to cheat and defraud one Marie Anne Pernelle of her monies, for the support of his profligate way of life, heretofore, to wit, on, &c. at, &c., wickedly, deceitfully, unlawfully, knowingly, and designedly did falsely pretend and affirm, to the said M. A. P. that the name of him the said J. H. was Reeve, and that he was well known. That a woman had appeared before him at the Alien Office, to lay an information against her, the said M. A. P., and that the said woman would be entitled to £40, if her information was just. That he had spoken to the said woman, and had promised her £10, which the said M. A. P. must give to him the said J. H., for the said woman; and that the said J. H., by means of the said false pretences, did then and there, unlawfully, knowingly, and designedly, obtain of and from the said M. A. P. a large sum of money, to wit, the sum of £4, in divers, to wit, four bank-notes, being made for the payment of the sum of £1 of lawful money each and respectively, and being each and respectively of the value of £1, of like lawful money, with intent, then and there, to cheat and defraud the said M. A. P. of the said bank-notes, the said bank-notes, and of each of them, then and there being in force, and being the property of the said M. A. P., and the said sums of money payable and secured by the said bank-notes, respectively, then and there being unsatisfied to the said M. A. P. the proprietor thereof; whereas, in truth and in fact the name of him, the said J. H. was not Reeve; and whereas, in truth and in fact, no woman had appeared at the Alien Office to lay an information against the said M. A. P., and whereas, in truth and in fact, the whole of the said matter, so pretended and affirmed by the said J. H., was false and was fabricated and invented by the said J. H., for the purpose of cheating and defrauding the said M. A. P., in contempt, &c., to the evil, &c., against the form, &c., against the peace, &c.

{*Second count* stated the pretence rather differently, and that defendant obtained of, &c., divers, to wit, two other bank-notes each of the said last-mentioned notes, being made for the payment of the sum of £1 of lawful, &c., and being respectively of the value of £1 of like, &c., with intent, &c.

Third count same as first, the pretence stated differently.

Fourth count varying from third as second from first.

315. *Indictment for perjury, assigned on an affidavit made before a judge to support costs.*

That heretofore, to wit, on the 21st day of December, in the 46th year of the reign of our said lord the king, a certain action of trespass and ejectment was depending in the court of our said lord the king, before the king himself (the said court then and still being holden at W. in the county of M.) wherein one John Doe, as the lessee of one George Ryder, was the plaintiff, and one Joseph Ryder, one Benjamin Ryder, and one other Joseph Ryder, were the defendants, in which said action an issue had theretofore been duly joined between the parties; and the said issue so joined had theretofore, to wit, on, &c. at the Castle of York, in the county of York, been duly tried by the jurors of a certain jury, of the said county of York. And the jurors of the said jury of the said county of York had, at and upon the trial of the said issue, said, upon their oath, that the said J. R., B. R., and J. R. were guilty of the said trespass and ejectment, and had assessed the damages of the said John, by reason of the said trespass and ejectment, besides his costs and charges by him in and about his suit in that behalf laid out, to one shilling, and for those costs and charges to forty shillings. And the jurors aforesaid, now here sworn and charged upon their oaths aforesaid, do further say, that the name John Doe, so used in the said action, was merely fictitious, and was not the name of any real existing person, to wit, at, &c. And the jurors aforesaid now here sworn and charged, upon their oath aforesaid, do further present, that George Dimsdale, late of ———, well knowing the premises, but contriving and wickedly and maliciously intending to aggrieve and injure the said J. R., B. R., and J. R., and un-

lawfully to cause them to pay and to be compelled to pay divers large sums of money, and to cause and procure a large and unreasonable sum of money, to be in and by the said court of our said lord the king, before the king himself, adjudged in the said action to the said John Doe, for the increase of his costs and charges by him about his said suit in that behalf expended, heretofore, that is to say, on, &c., to wit, at, &c., did come in his, the said G. D.'s proper person, before Sir S. Lawrence, Knt., then being one of the justices of the said court of our said lord the king, before the king himself, and did then and there produce to and before the said Sir S. Lawrence, so being such justice as aforesaid, and then and there having lawful and competent authority to receive the affidavit of him, the said G. D., in that behalf, a certain paper writing, as and for and in order that the same might become and be, and be taken and received to be, an affidavit of him the said G. D., in the said action, which said paper writing is as follows, to wit,

In the king's bench, between (h) George Ryder (meaning the said George Ryder) plaintiff, and J. R., B. R., and J. R., defendants, (meaning the said J. R., &c. meaning thereby the said action so brought, prosecuted, and carried on, by the said G. R., in the name of John Doe as the lessee of him the said G. R.) And the said G. D. was then and there before the said Sir S. L. duly sworn, and did take his corporal oath upon the holy gospels of God concerning the truth of the contents of the said paper writing, the said Sir S. L. having then and there competent power and authority to administer an oath to him the said G. D. in that behalf. And the jurors now here sworn and charged, upon their oath aforesaid, do further present, that the said G. D. being so sworn as aforesaid, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and meaning and intending unjustly to aggrieve the said J. R., B. R., and J. R., as aforesaid, before the said Sir S. L. (the said Sir S. L. then and there having, &c.) in and by the said paper writing, falsely, maliciously, knowingly, wickedly, wilfully, and corruptly did depose, swear, and make affidavit in writing,

(h) This affidavit was not properly entitled in the cause, and a counsel of the greatest eminence was of opinion that, on that account, the indictment

could not be supported. See *Bevan v. Bevan*, 3 T. R. 601: but see *R. v. Roper*, 1 Starkie's C. 532.

(amongst other things) in substance and to the effect following (that is to say) I. H., I. W., and L. M., were all of them severally subpoenaed on the part of the plaintiff (meaning the plaintiff in the said action); and that the said I. W., and L. M. were each of them paid 5s. with their subpoenas, and that the said I. W. and L. M. were respectively absent from their places of abode in going to and returning from the said assizes, (meaning the assizes holden at the castle of York, in and for the county of York) at which the said issue had been so tried as aforesaid 14 days; and that he the said G. D. paid to the said I. W. for his loss of time, trouble, and attendance, the sum of 3l. 10s., and that he paid to the said L. M. for his loss of time, trouble, and attendance, the sum of 3l. 10s., which said affidavit, he the said G. D. afterwards, to wit, on, &c., at, &c., exhibited to the said court of our said lord the king, as and for an affidavit in the said action, and that the said G. D. then and there by and by means of the said affidavit, did then and there unlawfully and wrongfully cause and procure divers large sums of money, to be in and by the said court of our said lord the king, before the king himself, adjudged to the said John Doe, in the said action, for the increase of his costs and charges, by him about his said suit in that behalf expended; whereas in truth and in fact, the said I. W., and L. M., were not nor was either of them paid with their subpoenas 5s; and the said G. D. at the time when he took his said oath aforesaid, well knew the same, to wit, at L. aforesaid, in the parish and ward aforesaid. And whereas in truth, and in fact, the said I. W., and L. M., were not respectively absent from their places of abode, nor was either of them absent from his place of abode in going to, and returning from the said assizes, fourteen days, and whereas in truth and in fact, the said L. M. was absent from his place of abode, in going to and returning from the said assizes a much less space of time than fourteen days, to wit, eight days only, and no more, and the said G. D. at the said time when he so took his said oath aforesaid, well knew the same, to wit, at, &c., and whereas in truth and in fact, the said G. D. did not pay to the said I. W. for his loss of time, trouble, and attendance, the sum of 3l. 10s.; and whereas in truth and in fact, the said I. W. was not paid for his loss of time, trouble, and attendance the sum of 3l. 10s., and whereas in truth and in fact, the said G. D. did not pay to the said L. M. for

his loss of time, trouble, and attendance, the sum of 3l. 10s., and whereas in truth and in fact the said L. M., was not paid for his loss of time, trouble, and attendance the sum of 3l. 10s., but much less, to wit, the sum of 1l. 8s., and whereas in truth and in fact, the said I. W., was not paid any sum of money whatever for his loss of time, trouble, and attendance; and whereas in truth and in fact the said sum of 3l. 10s. was not paid for the loss of time, trouble, and attendance of the said L. M. but a much less sum, to wit, the sum of 1l. 8s., and whereas in truth and in fact no sum of money was or had been paid for the loss of time, trouble, and attendance of the said I. W., and so the jurors aforesaid, now here sworn and charged upon their oath aforesaid, do say that the said G. D., on, &c., at, &c., before the said Sir S. L. then and there, &c., by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner and form aforesaid, did knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, commit wilful and corrupt perjury, to the evil and pernicious example of all others in the like case offending, to the great damage of the said I. R., B. R., and J. R., and against the peace, &c.

316. *Information for falsely swearing that a young lady was of age, thereby obtaining a marriage licence with intent to marry her against her guardian's consent, and also marrying her. (i)*

London to wit. Be it remembered, that Sir John Mitford, Knt., attorney general of our present sovereign lord, who, &c., that at the time of committing, the several offences hereinafter mentioned, one Maria Withers was a maiden and unmarried, and was under the age of twenty-one years, viz. of the age of fourteen years or thereabouts, and was entitled unto a very considerable personal estate of the value of 1000l. and upwards, and had no father living, and was under the care, custody, and guardianship of Susannah Withers, of, &c., her mother; and that James Thomson late of London, baker, being an ill-disposed person, and a person of low condition and circumstances of life, and having little or no substance or estate, well knowing all the premises aforesaid, but contriving and intending to entice, inveigle, take, and carry away the said

(i) See 5 St. Tr. 463. Str. 1160. *R. v. Verelst.* 3 Camp. 432.

M. W. from the care, custody, and guardianship of the said S. W. her mother and guardian as aforesaid, and to possess himself of the person, fortune, and estate of the said M. W., and to cause and procure a marriage to be in fact had and solemnized between himself the said J. T. and the said M. W. in a secret and clandestine manner, without publication or proclamation of banns of marriage in that behalf, and without the consent and against the will of the said S. W. her mother and guardian as aforesaid, and to deceive, defraud, and impose upon* (John, by Divine Providence, lord archbishop of Canterbury, Sir William Scott, Knt., doctor of laws, master or commissary of the faculties, and F. L. a surrogate duly appointed to receive and take the allegations and affidavits of persons desirous of obtaining licenses for the solemnization of matrimony, from the said archbishop of Canterbury, under the seal of the office of faculties of the said archbishop, did on, &c. at, &c. come in his own proper person, before the said F. L. as such surrogate as aforesaid, and did then and there falsely, knowingly, and deceitfully make a certain allegation and affidavit to and before the said F. L. purporting and containing amongst other things, that he the said J. T. intended to marry with M. W., a spinster, aged above twenty-one years, and that he knew of no lawful impediment by reason of any pre-contract, consanguinity, affinity, or any other lawful means whatsoever, to hinder the said intended marriage, and of the truth of the premises, the said T. then and there took his corporal oath, and was sworn upon the holy gospel of God, before the said F. L. as such surrogate as aforesaid. And the said J. T. then and there prayed a license to solemnize such marriage in the parish church of St. Pancras aforesaid, and then and there, in order to obtain such license, did deceitfully, advisedly, and unlawfully exhibit, and cause to be exhibited and to be filed, his said allegation and affidavit in writing in the said office of faculties of the said archbishop, by colour and pretext of which said false affidavit and allegation by him the said J. T., in form aforesaid, made and exhibited, and caused to be exhibited and filed, he the said J. T. afterwards, that is to say, on, &c. at, &c. did fraudulently, unlawfully, and deceitfully obtain a certain license and faculty from and in the name of the aforesaid archbishop, under the seal of his office of faculties aforesaid, bearing date the, &c. for the

solemnization of matrimony in the parish church of St. Pancras, in the county of M., between the said J. T. and M. W., without the publication or proclamation of the banns of matrimony, which said license was then and there granted and issued upon faith and credence given to the said false affidavit and allegations of the said J. T.* And the said attorney-general of our said lord the king, giveth the court here to understand and be informed, that the said J. T., in further prosecution of his wicked desires and intentions aforesaid, and to complete and bring the same into effect, afterwards, that is to say, on, &c. at, &c. for the sake of lucre and of the said estate and fortune of the said M. W., against the will and without the consent of the said S. W., then and there being the mother and guardian of the said M. W. as aforesaid, did wilfully, advisedly, and deceitfully inveigle, entice, allure, and persuade her the said M. W. to contract matrimony with the said L. T., and thereupon did then and there wickedly, unlawfully, and by sleight, did inveigle, entice, take, and carry away the said M. W. from and out of the custody of her said mother and guardian, with intent to marry her the said M. W., and afterwards, that is to say, on the day and year last-mentioned, the said L. T. did advisedly, wilfully, and deceitfully cause and procure a marriage in fact to be had and solemnized between himself and the said M. W., in the parish church of St. Pancras, in the county of M., to wit, at L., &c. by colour of the said license and faculty last-mentioned, without any lawful or sufficient publication or proclamation of the banns of matrimony between the said J. T. and M. W., against the will and without the consent of the said S. W., the mother and guardian as aforesaid; and the said J. T. other wrongs to the said M. W. then and there unlawfully, wickedly, and maliciously did, in contempt of our said lord the now king and his laws, to the great disgrace and disparagement of her the said M. W., to the great grief and disconsolation of the friends and relations of the said M. W., to the great fraud and deceit of the said archbishop and of the said master and commissary of the faculties and the surrogate aforesaid, to the evil example, &c. and against, &c.

Second count, same as first, except, instead of those lines between the asterisks insert the following;) The said archbishop and the said master and commissary of the faculties did, in order to obtain a license for the solemnization of matrimony between himself the said J. T. and

the said last-mentioned M. W. without the publication or proclamation of the banns of matrimony in that behalf, on, &c. at, &c. knowingly, deceitfully, and unlawfully exhibit and cause to be exhibited, to the master or commissary of the faculties in the said office of faculties, a certain allegation in writing, in form of an affidavit, purporting and containing therein, among other things, that he the said J. T. intended to marry with the said last-mentioned M. W. a spinster, aged above 21 years, and that he knew of no lawful impediment by reason of any precontract consanguinity, affinity, or any other lawful means whatever, to hinder the said intended marriage. And the said J. T. then and there prayed a license to solemnize such marriage in the parish church of St. Pancras aforesaid, by colour and pretext of which said last-mentioned false allegation in writing, by him the said J. T. in form aforesaid made and exhibited, he the said J. T. afterwards, viz. on, &c. at, &c. did fraudulently and unlawfully obtain and procure a certain license and faculty from and in the name of the aforesaid archbishop, under the seal of his office of faculties aforesaid, for the solemnization of matrimony in the parish church of ———, in, &c. between the said J. T. and the said last-mentioned M. W. without the publication or proclamation of the banns of matrimony, which said last-mentioned license was then and there issued and granted upon faith and credence given to the said last-mentioned false allegation of the said J. T. And the said A. G. (*same as the first to the end*),

317. *Indictment for perjury, committed before an arbitrator under a reference by rule of court.*

London, to wit. The jurors for our lord the king upon their oath present, that heretofore, that is to say, at the sittings at Nisi Prius, held at Westminster Hall, in the great hall of pleas there, in and for the county of Middlesex, on Friday (*k*) the 4th day of July, in the 46th, &c. before the Right Honourable Edw. Lord Ellenborough, Chief Justice of our lord the king, assigned to hold pleas before the king himself, a certain issue before then duly

(*k*) This may be either the first day of the sittings or the day when the cause came on to be tried. See *Purcell v. Macnamara*, 9 East, 157, *R. v. Hucks*, 2 Starkie, C. 521.

joined in the court of our said lord the king, before the king himself; (the said court at the time of joining the said issue being held at Westminster, in the said county of M.) in a certain action then depending in the said court, wherein one M. H. esq. was plaintiff, and on E. G. esq. was defendant, came on, and was about to be tried by a certain jury of the country, and thereupon at the said sitting it was by a certain order then and there made and ordered, by the court by and with the consent of the plaintiff and defendant, their counsel and attornies (among other things) that the last juryman sworn and impannelled should be withdrawn out of the pannel, and that the proceedings in the said action, and also in an action brought by the defendant in that action against the plaintiff in that action, in the city of B. should be discontinued without costs on either side. And it was also ordered, by and with such consent as aforesaid, that all other matters in difference between the parties should be referred to the award, order, arbitrament, final end, and determination of such person as Mr. Serjeant P. and Mr. C. T. should, by writing under their respective hands, at the foot of the said order, nominate and appoint, so as he should make and publish his award in writing of and concerning the premises in question so as aforesaid referred, on or before the second day of E. T. then next ensuing, and that the plaintiff and defendant in the said action should be examined upon oath to be sworn before the said lord, C. J. or some other justice of the same court of our said lord the king, before the king himself, if thought necessary by the said arbitrator, and that the said court of our said lord the king, before the king himself, might be prayed that the said order might be made a rule of the same court, and the jurors, &c. that the said Mr. Serj. P. and Mr. C. T. in the said order mentioned, did, afterwards, to wit, on the 8th day of November, in the 46th year aforesaid, to wit, at London, in the parish of St. Dunstan-in-the-West, in the ward of Farringdon-without, by writing under their respective hands at the foot of the said order, nominate S. C. C. esq. to be the arbitrator between the said parties, who thereupon did then and there accept and take upon himself the burthen of the said arbitration, and that afterwards, to wit, on Wednesday next, after 15 days from Easter day, in the 47th year of the reign of our said lord the king, it was by a certain rule or order then made in the said action by the court of our said lord

the king, before the king himself, the said court then being held at Westminster aforesaid, ordered, that the said order so made at the said sitting at Nisi Prius should be entered and made a rule of the said last-mentioned court. And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on the day and year last aforesaid, it was, by a certain other rule or order then made in the said action by the said court of our said lord the king, before the king himself (the said court then being held at W. in the said county of M.) ordered that the time limited for the said arbitrator making his award should be enlarged until the 30th day of April then instant, and that the said arbitrator should be at liberty, by writing under his hand, to direct a rule to be applied for, from time to time, for such further time as he might think fit. And that the said S. C. C. afterwards, to wit, on ———, A. D. ———, at ———, did, by writing under his hand, direct that application should be forthwith made to the said court of our said lord the king, before the king himself, for enlarging the time for making his award in the said matter to the second day in the then next Michaelmas term; and that thereupon, afterwards, in pursuance of the said direction of the said S. C. C., to wit, on Wednesday next, after one month from Easter day, in the 47th year of the reign of our said lord the king, it was, by a certain other rule or order then made in the said action by the court last aforesaid (the said court then being held at W. in the county of M.) ordered that the time limited for the said arbitrator making his said award should be further enlarged until the second day of the then next M. T. And that afterwards, to wit, on Friday next after the Morrow of All Souls, in the 48th year of the reign of our said lord the king, it was, by a certain other rule or order then made in the said action by the court last aforesaid, (the said court then being held at W. in the county of M.) by the consent of Mr. K. of counsel for the defendant, and Mr. B. of counsel for the plaintiff, ordered, that the time limited for the said arbitrator making his said award, be further enlarged until the 2nd day of the then next E. T., to wit, at ———. And the jurors, &c. that the said S. C. C., the said arbitrator, after the taking upon him the burthen of the said arbitration, to wit, on ———, in ———, at ———, did think it necessary that the said E. G. should be examined upon oath, in answer to certain interrogatories then and there submitted to

him the said S. C. C., for the examination of the said E. G., touching and relating to the matters in difference between the said M. W. and the said E. G., so referred to him the said S. C. C. as aforesaid; which said interrogatories then and there contained, among other things, certain questions and matters of and concerning certain lands and tenements, called the East Mark Estate, and a certain lease theretofore granted to one G. W. Hall, and which said questions and matters were then and there material to the matters in difference between the said M. W. and the said E. G., so referred to him the said S. C. C. as aforesaid, in substance and to the effect following: that is to say, "did you" (*stating the interrogatories.*) And the jurors, &c., that the said E. G. having seen the interrogatories, afterwards, to wit, on the 8th day of March, in the 48th year, &c. at London aforesaid, to wit, at —, came in his own proper person before the said Right Honourable Edw. Lord Ellenborough, Chief Justice of the court of our said lord the king, before the king himself, in order to answer upon oath to the said interrogatories, and then and there, before the said C. J., exhibited and produced a certain answer or examination in writing of him the said E. G. to the said interrogatories, with intent that the same answer and examination in writing might be afterwards exhibited to the said S. C. C. as such arbitrator as aforesaid. And that the said E. G. did then and there, with such intent as aforesaid, before the said C. J., take his corporal oath, and was then and there duly sworn to the truth of the said answer or examination in writing of him the said E. G. to the said interrogatories, he the said C. J. then and there having sufficient and competent power and authority to administer an oath to the said E. G. in that behalf. And the jurors, &c. that the said E. G., being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and devising, and wickedly and maliciously intending to injure the said M. W., and to impede and pervert the course of justice, and to procure the said S. C. C., so being such arbitrator as aforesaid, to make his award touching the matters so to him the said S. C. C. referred as aforesaid, favourable to him the said E. G., did then and there, to wit, on the same day and year last aforesaid, at L. aforesaid, at, &c., in and by his said answer and examination in writing upon his oath aforesaid, before the said C. J., falsely, wickedly, wilfully, and corruptly and by his own proper act and consent, depose

and swear, amongst other things, in substance and to the effect following: that is to say, (*set out the answers, and negative them by the assignments of perjury, and conclude.*) And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. G., in and by his said answer and examination in writing upon his oath aforesaid, on the 8th day of March, in the 48th year of the reign aforesaid, at L. aforesaid, in the parish of ———, did, in manner and form aforesaid, commit wilful and corrupt perjury, to the great displeasure, &c.

318. For PERJURY in swearing before a surrogate that one J. L. had died intestate in ORDER TO obtain letters of administration.

London to wit. The jurors for our lord the king, upon their oath, present, that A. L. late of, &c. spinster, being an evil-disposed person, and wickedly devising and intending to deceive and impose upon the Right Honourable Sir W. Wynne, knt., doctor of laws, master, keeper, or commissary of the Prerogative Court of Canterbury, lawfully constituted, and also to defraud one M. B., and unlawfully to cause and procure administration of all and singular the goods, chattels, and credits, which were of one J. L. late of, &c. deceased, at the time of his death, to be granted to her the said A. L., by ———, by Divine Providence, archbishop of Canterbury, primate of all England, and metropolitan, as if the said J. L. was dead intestate heretofore, to wit, on, &c. at, &c. personally appeared before the Worshipful T. E., doctor of laws, then and there being surrogate of the said Sir W. W., knt., so being such master, keeper, or commissary of the Prerogative Court of Canterbury as aforesaid, and did then and there take her corporal oath, and was duly sworn upon the holy gospel, before the said T. E., the surrogate aforesaid, (he the said T. E. then and there having sufficient power and authority to administer the said oath to the said A. L. in that behalf.) And the said A. L., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, did then and there, before the said T. E., being such surrogate as aforesaid, upon her oath aforesaid, falsely, maliciously, wilfully, and corruptly, say, depose, and swear, among other things, that the said A. L. believed that the said J. L. was dead intestate; whereas, in truth and in fact, the said J. L. had, in his lifetime, duly

made and published his last will and testament in writing, which said last will and testament was in full force at the time of the death of the said J. L. And whereas, in truth and in fact, the said A. L. knew and believed that the said last will and testament of the said J. L. was in full force at the time of the death of the said J. L. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. L., on, &c. at, &c. before the said T. E., being such surrogate as aforesaid, and having sufficient power and authority to administer the said oath to the said A. L., falsely, maliciously, corruptly, and wilfully, in manner aforesaid, in and by her oath, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil, &c. and against the peace, &c.

319. *Information at the Quarter Sessions under the st. 5 & 6 Ed. 6. c. 14. for forestalling (l).*

Town of Hertford. At the general quarter sessions of the peace of our sovereign lord the king, held at Hertford, in the county of Hertford, of and for the town of Hertford aforesaid, on the 8th day of October, in the 6th year of, &c. and in the year of our Lord 1766, before ——— and others, assigned to keep the peace in the said town, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said town committed, cometh Richard Williams, of the parish of ———, in the county of ———, butcher, in his proper person, and as well for our said lord the king as for himself, giveth the court here to understand and be informed, that Benjamin Cherry, late of the parish of All Saints, in the town of Hertford aforesaid, butcher, not regarding the laws of this realm, after the 1st day of May, A. D. 1552, and on divers days and times between ——— and the ——— day of ———, A. D. 1766, at the parish of ——— aforesaid, in the town of Hertford aforesaid, and within the jurisdiction of this court, did engross and get into his hands, by buying of divers persons to this informant as yet unknown, divers quantities of bacon, to wit, 7000 stone weight of bacon, at eight pounds to a stone, at a certain price, to wit, the price of —, of lawful money of Great Britain, for every stone thereof, amounting in the whole to a large sum of money, to wit,

(l) See Indictments for engrossing, *supra* 681, 737.

the sum of —, to the intent to sell the same again, against the form of the statute, &c., whereby the said Benjamin hath forfeited, for that his first offence, *l.* of lawful money of Great Britain, to wit, the value of the same bacon, so by him in manner and form aforesaid, and against the form, &c. bought and engrossed, and the said R. W. is ready to verify the same as the law requires. Whereupon the said R. W. as well for the said lord the king as for himself, prayeth the advice of this court in the premises, and that the aforesaid B. Cherry may be convicted of the premises, and suffer and pay the punishment and penalty by law to be inflicted, according to the form and effect of the statute in that case made and provided, and that the said R. W. may have one moiety of the penalty and forfeiture aforesaid, and that the said B. C. may answer the premises, and that the process of this court (*m*) may issue accordingly. R. W.

Affidavit (n).

R. Williams, of the parish of, &c. butcher, the informant named in the said information hereunto annexed, upon his corporal oath saith, that the offence in the said information was not committed in any other county than the county of Hertford, where, by the same information, the same is supposed to have been committed. And that he this deponent believes, in his conscience, that the said offence was committed within a year before the said information, within the same, to wit, at the town of Hertford, in the same county, where the said information is commenced, viz. in the said town and county of Hertford.

R. WILLIAMS.

(*m*) See the provision of the st. 5 & 6 Ed. 6. c. 14. s. 10.

By the st. 18 Eliz. c. 5. made perpetual by the st. 27 Eliz. c. 10. Every informer upon any penal statute shall exhibit his suit in proper person, and pursue only by himself, or by his attorney in court; and upon every infor-

mation a note shall be made of the day, month, and year of the exhibiting thereof in any office, to be of record from that time and not before. And no process shall be sued out until such information be exhibited, upon which process shall be indorsed the party's name that pursueth the statute, and upon

320. *Indictment for unlawfully compounding a penalty, contrary to the statute (o).*

That one Thomas Haman, heretofore, that is to say, on the——day of——, in the——year of the reign of our sovereign lord George the Third, &c. prosecuted out of the court of our said lord the king, before the king himself, the same court then being at Westminster, in the county of Middlesex, a certain writ of our said lord the king, called a latitat, against one I. B. directed to the then sheriff of Worcestershire, by which said writ, reciting that our said lord the king commanded the said then sheriff, that he should take the said I. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said writ, so sued out, as aforesaid, by the said Thomas Haman, was by him sued out with intent to

which the information is grounded.

By the st. 31 Eliz. c. 5. The offence shall be laid to have been committed within the proper county; and by st. 21 G. 1. c. 4. s. 1. no officer shall receive or file, &c. any information for an offence required to be tried in the proper county till the informer has taken an oath before a judge of the court that the offence was not committed in any other county, the same to be entered of record.

(o) The st. 18 Eliz. c. 5. s. enacts, that if any informer by colour or pretence of process, or without process, upon colour or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court, he shall stand two hours in the pillory (this part is abolished by the

st. 56 G. 3. c. 138.) and be forever disabled to sue on any popular or penal statute, and shall forfeit 10l.—The threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties under a statute, is not in itself an indictable offence at common law; for it is a threat which a firm and a prudent man may well be expected to resist (*R. v. Southerton*, 6 East, R. 6.); but yet it seems that it might be considered as an attempt to commit a statutable misdemeanor. *Ib.* In such case the offence intended should be shown to be within the statute, and laid to be against the form of the statute, *ib.* So it seems that the offence might have been laid as an attempt to defraud the revenue, by stifling a public prosecution for the sake of private gain, *ib.*

declare against the said I. B. in the same court, in a certain plea of debt, for a certain penalty supposed to have been incurred by the said I. B., by reason of his the said I. B.'s having before that time caused a certain waggon of him the said I. B. drawn by more than four horses, to wit, by five horses, to travel and pass upon a certain turnpike road in the parish of——, in the said county of W., the fellies of the wheels of the same waggon, at the time the same so passed along the same road, being of less breadth and gage than nine inches from side to side, against the form of the statute, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. H. late of ——, in the said county, being a person of an evil-disposed mind, and not regarding the statute in that case made and provided, on the first day of December, in the third year, &c. at the parish of B., in the said county, unlawfully and for wicked gain sake did take upon himself to compound and agree with the said I. B. for the said offence, without the order or consent of the court of our said lord the king before the king himself, out of which same court the said writ against the said I. B. was so sued out as aforesaid, and then and there did exact, receive, and have, of and from the said I. B., a large sum of money, to wit, four pieces of gold coin of the realm, of the value of 5*l.* 5*s.* of lawful money of Great Britain, as and for a reward for compounding with the said I. B. for the said offence, and desisting from further prosecuting his suit against the said I. B., against the form, &c. and against the peace, &c.

(*Second Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. H., being an evil-disposed person, and disregarding the statute in that case made and provided, on the said —— day of ——, in the said second year of the reign aforesaid, at &c. by colour and pretence of a certain process, by him before that time taken out and prosecuted out of the court of our said lord the king, before the king himself, against the said I. B., for and on account of a certain offence supposed to be committed by the said John, in this that the said J. had before caused a certain waggon of him the said J., drawn by more than four horses, to wit, by five horses, to travel and pass upon a certain turnpike road, in the parish of——, in the said county of——, the fellies of the wheels of the same waggon, at the time the same so passed along the said road, being of less breadth and gage

than nine inches from side to side, contrary to a certain statute in that case made and provided, he the said T. H. unlawfully and for wicked gain sake, did take upon himself to make composition with the said I. B. for the said last mentioned offence, and did then and there take and receive, of and from the said I. B., a large sum of money, that is to say, five pieces of gold coin of the proper coin of this kingdom, called guineas, of the value of five pounds and five shillings, as and for a reward for his, the said T. H.'s desisting and forbearing to prosecute the said I. B. for the said last mentioned offence, without the order and consent of the said court of our said lord the king, before the king himself, or without the order or consent of any of our lord the king's courts at Westminster, for that purpose had and obtained against the form of the statute, &c. and against the peace, &c.

(*Third count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. H. being an evil disposed person, and disregarding the statute in that case made and provided, on the day of , in, &c., at, &c. upon colour and pretence of the said I. B.'s having committed a certain offence against a certain penal law, in this, that the said I. B. had before that time caused a certain waggon of him the said I. B., drawn by more than four horses, to wit, by five horses, to travel and pass upon a certain turnpike road, in the, &c. the fellies of the wheels of the same waggon, at the time the same so passed along the said road, being of less breadth and gage than nine inches, from side to side, contrary, &c. did unlawfully and for wicked gain sake, and without the order and consent of any of our lord the king's courts at Westminster, take upon himself to make compensation with the said I. B. for the said supposed offence last mentioned, and did then and there take and receive of and from the said I. B. a large sum of money, viz. ten pieces of gold coin of the proper coin of this kingdom, called guineas, of the value of 10*l.* 10*s.* of lawful money of Great Britain, as and for a reward for his the said T. H.'s forbearing to prosecute the said I. B. for the said supposed offence, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

321. *Indictment for keeping a ferocious mastiff unmuzzled.*

That A. O., late of ———, in the said county ———, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the Third, of the united kingdom of Great Britain and Ireland, king, defender of the faith, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, near unto the king's common highway there, unlawfully did keep, and still doth keep, a certain large dog, of a fierce and furious nature; and the said dog, on the said ——— day of ———, in the year aforesaid, and on the said other days and times, at the parish aforesaid, in the county aforesaid, near unto the said highway there, unlawfully did permit and suffer, and still doth permit and suffer, to go unmuzzled and at large, by reason whereof the liege subjects of our said lord the king, on the said ——— day of ———, in the year aforesaid, and on the said other days and times, at the parish aforesaid, in the county aforesaid, could not, nor can they now go, return, pass, and labour in and through the said highway there, without great danger and hazard of being bit, maimed, and torn by the said dog, and losing their lives, to the great damage, terror, and common nuisance of all the liege subjects of our said lord the king, in, by, and through the said highway there going, returning, passing, repassing, and labouring, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

322. *Indictment on the st. 6 G. 1. c. 18, commonly called the Bubble Act.*

London. That W. H. late of, &c. and ——— late of, &c. being ill-disposed persons, not regarding the laws and statutes of this realm, nor fearing the pains and penalties therein contained, after the making of a certain act of parliament, made in the parliament of the late sovereign lord George the First, late king of Great Britain, &c. at a

session thereof, holden at Westminster, in the county of Middlesex, in the sixth year of the reign of the said late king, intituled, "An act for better securing certain powers and privileges intended to be granted by his majesty, by two charters for assurance of ships and merchandizes at sea, and for lending money upon bottomry, and for restraining several extravagant and unwarrantable practices therein mentioned;" and after the 24th day of June, 1720, mentioned in the said act of parliament, to wit, on the 24th of September, in the 47th year of the reign of our sovereign lord George the Third, by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith, at London aforesaid, to wit, in the parish of St. Mildred the Virgin, in the Ward of Cheap, did unlawfully, and without legal authority, either by act of parliament or by any charter from the crown, *contrive* a certain dangerous, mischievous, and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of a great number of his majesty's subjects in their trade, commerce, and other lawful affairs, that is to say, a certain dangerous, mischievous, and unlawful undertaking, to raise a capital of 100,000l., in transferable shares of 100l., for forming a certain company, to be called the British Copper Company, in contempt of our said lord the king and his laws, to the great damage and common nuisance of great numbers of the liege subjects of our said lord the king, against the form, &c. and against the peace, &c.

Second count same as the first, inserting *practice* instead of *contrive*.

Third count same as the first, inserting the words *attempt to practice* instead of *contrive*.

(*Fourth count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said defendants, being ill-disposed persons as aforesaid, after the making of the said act of parliament, and after the said 24th day of June, 1720, mentioned in the said act of parliament, to wit, on the 12th day of November, in the 48th year of the reign of our said lord the king, at London aforesaid, in the parish and ward aforesaid, did unlawfully, and without legal authority, either by act of parliament or by any charter from the crown, *contrive* a certain other dangerous, mischievous, and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of a great number of his majesty's subjects in their trade,

commerce, and other lawful affairs, * (that is to say) a certain dangerous, mischievous, and unlawful undertaking, to form a company as joint traders and copartners, for purchasing copper and other metals, smelting, manufacturing, and selling the same from the — day of — under the firm of the British Copper Company, with a capital 150,000l. in 1500 shares, in contempt, &c.

Fifth and sixth counts vary from the fourth as second and third from first.

*Seventh count same as the fourth to this mark *, and then as follows.* That is to say, a certain other dangerous, mischievous, and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of a great number of his majesty's subjects in their trade, commerce, and other lawful affairs, that is to say, undertaking a certain dangerous, mischievous, and unlawful *, to raise a capital of 100,000l., in transferrable shares of 100l. each, for forming a certain company, to be called the British Copper Company, and in furtherance of their said last-mentioned dangerous, mischievous, and unlawful undertaking, did then and there, to wit, on the said 24th day of September, in the 47th year aforesaid, and on divers other days and times between that day and the taking of this inquisition, at L. aforesaid, in the P. and W. aforesaid, under false pretences of public good, unlawfully presume, according to their own devices and schemes, to open certain books for public subscriptions, in order to raise the said capital of 100,000l. in manner and for the purpose, last aforesaid †, and did then and there, to wit, on the said 24th of September, in the 47th year aforesaid, and on divers other days and times, between that day and the day of taking this inquisition, at L. aforesaid, in the parish and ward aforesaid, unlawfully ** draw in divers and very many unwary persons to subscribe therein, towards raising the said capital of 100,000l., as last aforesaid, in contempt, &c.

*8th count same as the 7th, substituting the following for the words subsequent to the **. To take certain subscriptions for raising the said capital of 100,000l. as last aforesaid, and did then and there unlawfully receive divers sums of money on the said subscriptions, in contempt, &c.*

*Ninth count same as eighth, leaving out those lines in the seventh between the marks † and **.*

*Tenth count same as the seventh to this mark *. A certain dangerous, mischievous, and unlawful undertaking,*

to form a company as joint traders and copartners for purchasing copper and other metals, and for smelting, manufacturing, and selling the same from the 24th day of September, A. D. 1807, under the firm of the British Copper Company, with a capital of 150,000*l.* in 1500 shares; and in furtherance of their said last mentioned dangerous, mischievous, and unlawful undertaking did then and there, to wit, on the said 12th day of November, in the 48th year of the reign aforesaid; and on divers (*continendo as before*) at L. aforesaid, in the P. and W. aforesaid, under false pretences of public good, unlawfully † (*Conclude as in seventh count.*)

Eleventh and twelfth vary from tenth as eighth and ninth from seventh.

Thirteenth count same as seventh to this mark *. A certain dangerous, mischievous, and unlawful undertaking to form a certain company, to be called the British Copper Company, by means of a certain capital of 100,000*l.* in shares of 100*l.* each, and did then and there pretend to make said shares of the said capital transferrable, without any legal authority, either by act of parliament or by any charter from the crown for so doing: in contempt, &c.

Fourteenth same as seventh to this mark *. A certain dangerous, mischievous, and unlawful undertaking to form a certain company as joint traders and copartners, for purchasing copper and other metals, smelting, manufacturing, and selling the same, from the said 24th September, 1807, under the firm of the British Copper Company, with a capital of 150,000*l.* in 1500 shares, and did then and there unlawfully pretend to make the said shares of the said capital assignable, without any legal authority, either by act of parliament or by any charter from the crown for so doing: in contempt, &c.

Fifteenth count. And the jurors, &c. that the said M. being, &c. after the making of the said act of parliament, and after the said 24th day of June, mentioned in the said act of parliament; to wit, on the 24th day of September, in the 47th year of the reign aforesaid, at L. aforesaid, in the P. and W. aforesaid, did unlawfully and without legal authority, either by act of parliament or by any charter from the crown, contrive, &c. that is to say, a certain dangerous, mischievous, and unlawful undertaking to raise a capital of 100,000*l.* in transferrable shares of 100*l.* each, for forming a certain company, to be called the British Copper Company; and in furtherance of their said last mentioned dangerous, mischievous, and unlawful un-

dertaking did then and there unlawfully print, publish, and circulate, and cause to be printed, published, and circulated a certain prospectus in the words and figures following; (to wit) (*setting out the Prospectus*) in contempt, &c.

Sixteenth count same as fifteenth. Using the word *advertisement* instead of *prospectus*.

Seventeenth same as fifteenth to this mark † then as the tenth to this mark ‡ and proceed as follows: a certain advertisement in the words and figures following, (here follows an abstract of the articles) in contempt, &c.

Eighteenth count same as seventh. *Practice* instead of *contrive*, and second left out.

Nineteenth same as eighth. *Practice* instead of *contrive*.

Twentieth same as ninth. *Practice* instead of *contrive*.

Twenty-first and *twenty-second* same as the tenth and twelfth. *Practice* instead of *contrive*.

Twenty-third same as seventh. Attempt to practice instead of *contrive*.

Twenty-fourth same as eighth and same difference.

Twenty-fifth, *twenty-sixth*, and *twenty-seventh* from ninth, tenth, and twelfth. *Attempt to practice for contrive*.

322. *Indictment for disobeying an order of sessions to pay a weekly sum for the relief of the defendant's father.*

Cornwall to wit. The jurors, &c. that on, &c. at, &c.

(p) Under the stat. 43 Eliz. c. 2. s. 7. which enacts that the father and grand-father, mother and grand-mother, and the children of every poor, old, blind, lame, and impotent person or other person not able to work, being of sufficient ability, shall at their own charges, maintain such poor person, as by the justices of the peace at their quarter sessions, shall be assessed; upon pain to forfeit 20s. for every month.

See the form of an indictment for disobedience of an order of justices under the Friendly Society Act, *R. v. Gash*, 1 Starkie's C. 441.

The indictment contained the order (which was dated the 3rd of October, 1815) which was set out at length; and recited, that complaint had been made, to the magistrates residing near the place where the society was held, by Job Jamieson, according to the statute 33 G. 3. c. 54. that he had been excluded from the society against the rules of the society, and contrary to the statute. That the society had been duly enrolled. That the defendants, being the stewards, had been duly summoned, and had thereupon appeared before the magistrates, who proceeded to hear

at a general quarter session of the peace of our said lord the king, then and there holden by adjournment, before ——— and others, their associates, justices of our said lord the king, assigned to keep the peace of our said lord the king, in the said county of C., and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, upon application made to the same court by the churchwardens and overseers of the poor of the parish of ———, in the said county, it was, by the said court, ordered, adjudged, and assessed, that W. W. of the parish of ———, in the said county, should, at his own costs and charges relieve and maintain one E. W. by his, the said W. W., paying to the churchwardens and overseers of the said parish of ——— weekly, and every week, from the day of making the said order until the said court should order to the contrary (q), the sum of four shillings for and towards the necessary relief and maintenance of the said E. W.: he, the said E. W., being a poor, old, impotent person, unable to work or maintain himself, and dwelling in, and being chargeable to, the said parish of ———, and being the father of the said W. W. and the said W. W. being of sufficient ability to relieve and maintain the said E. W. in the manner they directed, as by the said order (reference being thereunto had) more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on, &c. at, &c. the said W. W. was duly served with the said order, and had notice thereof; and that the said W. W. was then and there, and on divers other days and times between that day and the day of taking this inquisition, at, &c. requested to pay to the churchwardens and overseers of said

the matter of the said complaint; and having heard the allegations of Job Jamieson upon oath, and the allegations of the said defendants, did adjudge, that the said defendants and the other members of the said society should forthwith restore, reinstate, and re-admit the said Job Jamieson as a member of the said society: the indictment then alleged the service of notice of the order upon the defendants, and their neglect

and refusal. It appeared that the order had been served upon the defendants after they had ceased to be stewards; but it was held that it was still obligatory on them, as members of the society, to attempt to reinstate the complainant, and that their having ceased to be stewards was no justification of entire neglect on their part.

(q) According to the tenor of the order, but qu. whether the order ought to be so general.

parish of —, the said weekly sum in the said order mentioned for the purpose therein mentioned. Yet the said W. W., late of, &c. not regarding the said order nor the laws of this realm, did not, on the day and year last mentioned, and when he was so requested, nor hath he, since that day, weekly and every week, or at any time or week, relieved the said E. W. by paying to the churchwardens and overseers of the poor of the parish of — the said sum of four shillings, in the said order mentioned, for and towards the necessary relief and maintenance of the said E. W. or any part thereof; nor hath he, the said E. W., at any time or times, since the making of the said order, otherwise relieved, maintained, or provided for the said E. W., according to law; but, on the contrary thereof, the said E. W. on the day and year last mentioned, and continually from that day until the day of taking this inquisition, unlawfully, wilfully, obstinately, and contemptuously did, and yet doth neglect and refuse to pay and cause to be paid unto the churchwardens and overseers of the said parish of — for the time being, or to either of them, weekly and every week, or at any time or in any week whatsoever, the said sum of four shillings, in the said order mentioned, or any part thereof, for the purpose in the said order mentioned, the said E. W. being still alive, to wit, at, &c. contrary to the said order and in manifest breach and contempt of the same, in contempt of our said lord the king and his laws, to the great damage of the inhabitants of the said parish of —, to the evil example, &c. and against the peace, &c.

323. *Record of the presentment of (r) a highway by a justice of the peace on view.*

Surrey to wit. Be it remembered, that at the general quarter session of the peace of our lord the king, holden

(r) *R. v. Stoughton*, 2 Saund. 157. The defendant pleaded that the inhabitants of the parish of Stoke were bound by prescription to repair the road in question, and the king's coroner (the record having been removed by *certiorari*) demurred, on the ground that the defendant, in his plea, had not answered the charge of en-

croachment. But Saunders, for the defendant, answered that the defendant had been charged with the repairs by reason of tenure, that was the principal matter to be answered, and that if the defendant had been chargeable by reason of encroachment, he ought not to have been charged by reason of tenure, but by reason of

for the county of Surrey aforesaid, at Guilford, in the same county, on Tuesday, in the week next after the feast of the translation of St. Thomas the Martyr, that is to say, on the 14th day of July, in the 20th year of the reign of our lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. before Arthur Onslowe, Henry Hildeyard, and William Elliott, esquires, and other their fellows, justices of our said lord the king, assigned to keep the peace in the county of Surrey aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, came John Windbanke, esquire, one of the justices of our said lord the king, assigned to keep the peace, in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the same county committed, in his proper person, and upon his the said John Windbanke's own proper knowledge and view, according to the form of the statute in such case made and provided, then and there, in the court of our said lord the king, before the said justices, presented, that a certain common highway, lying in the parish of Stoke, near Guildford, in the county aforesaid, leading between the market-town of Guildford aforesaid, in the county aforesaid, and the market-town of Oakingham, in the county of Berks, in, through, over, and upon, a certain piece of land, lying in the parish of Stoke, near Guildford aforesaid, in the county of

croachment only, and of that opinion were the court. The general rule of common law is, that if a common highway be so out of repair that it is dangerous, or even incommodious, to travel over it, the public have a right to go upon the adjacent land, although it be sown with grain. See 2 Will. Saund. 161. n. 12. 1 Roll. Ab. 390. pl. 1. *Abson v. French*, 2 Show. 28. *Taylor v. Whitehead*, Doug. 749. If a party enclose the lands, and then deprives the public of their privilege, he is bound to make a perfect good way as

long as the inclosure lasts. *Ib.*, and *Duncombe's case*, Cro. Car. 366. *R. v. Flecknow*, 1 Burr. 465. *Steele v. Prickett*, 2 Starkie's C. 463. So if he enclose a road on one side which has been anciently enclosed on the other; but if he enclose one side only, and there be no ancient enclosure on the other, he is bound to repair *ad flumina* only. 1 Sid. 464. 1 Haw. P. C. 76. s. 7. *Steele v. Prickett*, 2 Starkie's C. 463. The obligation ceases with the encroachment. *Ambl. R.* 296. *Per Relynge*, C. J. 2 *Saund.* 160,

Surrey aforesaid, called Stoke Common, containing in length 270 rods, being from time whereof the memory of man is not to the contrary a common king's highway for all the liege subjects of our said lord the king, and his predecessors, kings and queens of England, with their horses, carts, and carriages, to go, pass, ride, and labour, at their pleasure, on the 5th day of March, in the eighteenth year of the reign of our said lord the now king, became, and continually afterwards hitherto was, and yet is, very ruinous, miry, deep, broken, and in great decay, for want of repairing and amending the said king's highway, so that the liege subjects of our said lord the king, with their horses, carts, and carriages, in, through, and over the said king's highway, from the said 5th day of March, in the eighteenth year aforesaid, hitherto could not, nor yet can, go, pass, ride, and labour, as they were wont and ought to do. And that Sir Nicholas Stoughton, of the parish of Stoke, near Guildford, in the county of Surrey aforesaid, baronet, being lord of the manor of Stoke, in the parish of Stoke aforesaid, ought to repair and amend the said common king's highway as often and when it was necessary, by reason of the tenure of certain lands, parcel of the said piece of land, called Stoke Common, containing in length 270 rods, and in breadth four rods, lying on the west side of the said common king's highway, so as aforesaid, ruinous, miry, deep, and in decay, by him the said Sir Nicholas Stoughton, on the 25th day of February, in the seventeenth year of the reign of our said lord the now king, enclosed and encroached from the said king's common highway, and by him the said Sir Nicholas continued to be enclosed and encroached from the said 25th day of February, in the seventeenth year aforesaid, hitherto; and which said land so as aforesaid enclosed and encroached for the whole time aforesaid, until the said 25th day of February, was parcel of the said common king's highway, to the great damage and common nuisance of all the liege subjects of our said lord the king, going, passing, riding, and labouring, in, through, over, and upon the said king's highway, with their horses, carts, and carriages; and against the peace of our said lord the now king, his crown and dignity.

324. *Indictment against a parish, with the exception of one township exempted specially by act of parliament, for not repairing a highway (s).*

That on the 8th day of April next after the making and passing of a certain act of parliament, passed in the nineteenth year, &c. "for repairing and widening the road from Garden-lane, in the county of Derby, to Sheffield, in the West Riding of the county of York, and also the road branching out of the said road, at or near Mosbrough Green, in the said county of Derby, to Clown in the said county," John Parker, &c. being sixteen of the trustees appointed by the said act to put the same into execution, at a meeting held, &c., made an order, that the road from Sheffield to Woodthorpe Common, being part of the road by the said act directed to be ordered, altered, widened, turned, and repaired, and part thereof being in Sheffield Park, in the same act mentioned, should be forty feet wide, &c. That at another meeting of the trustees, held on the 28th April, it was ordered, that the footway should be on the west side of the road, through Sheffield Park, &c.: that afterwards, to wit, on the 1st January, 1780, the said road in the said orders mentioned, in such parts thereof as was and is lying in Sheffield Park, was, in pursuance of the said orders, made and perfected, and then and there, by virtue of the same orders respectively, and of the said act, became and was and ever since hath been a common public king's highway for all the king's

(s) *R. v. the Inhabitants of Sheffield*, 2 T. R. 106. The defendants pleaded a prescriptive obligation on the inhabitants of the township of Sheffield, to repair all highways within the township, to which the prosecutors demurred, and judgment was given by the court of K. B. for the king. The act in question, viz. 19 G. 3. c. 99. directed, that the highways to be made in pursuance of the act, should be highways to all intents and

purposes, and be repaired as such. By a subsequent clause the inhabitants of the township of Sheffield were exempted from the repairing of any of the roads made under the act. The court held, that the township being thus specially exempted, the burthen of repairing, by the rule of common law, devolved upon the parish at large, with the exception of the township. See 1 Vent. 183, 9. 1 Ld Ray. 725. 5 Burr. 2700,

subjects, &c. That afterwards, to wit, on the 1st of June, 1785, a certain part of the said common king's highway in Sheffield Park (*particularly describing it*), and continually from that time was and is ruinous, &c. (*as in prec. 269, p. 694.*) and that the inhabitants of the said parish of Sheffield, (except the inhabitants of the township of Sheffield) ought to repair and amend the same when and so often as shall be necessary.

The *second count* stated, that on the 1st of June, 1785, there was and yet is a certain common king's highway, leading from the town of Sheffield to Woodthorpe, in the said county of York, for all the liege subjects, &c.; and that a certain part of the same common king's highway, situate and being in Sheffield Park (*particularly describing it*), on the 2nd of June, 1785, and continually from that time until, &c., was and yet is very ruinous, &c. (*as before*). And that the inhabitants of the parish of Sheffield, (except the inhabitants of the township of Sheffield, who are exempted from the repair thereof, by virtue of an act of parliament passed in the nineteenth year, &c.) ought to repair and amend the same when and so often as shall be necessary, &c.

PLEAS.

325. *Not guilty in case of treason or felony.*

And being immediately asked, how he will acquit himself of the premises (*in case of felony, or of the treasons, in case of treason,*) above laid to his charge, saith that he is not guilty thereof, and thereof for good and for ill he puts himself upon the country (*a*).

326. *Not guilty upon an information in the King's Bench.*

And now, to wit, on ——— next after three weeks of St. Michael in that same term, before our lord the king, at Westminster, comes the said A. B. by C. D. his attorney, and after oyer of the said information, saith, that he is not guilty thereof, and of this he puts himself upon the country; and the said C. D. attorney-general of our said lord the king, in the court of our said lord the king, who prosecutes for our said lord the king in this behalf, doth the like, &c.

327. *Plea of a wrong addition (b).*

And the said A. B. (*c*), who in and by the said indictment is called by the name and addition of A. B. late of the parish of K. in the county of M. yeoman, in his own person cometh, and having heard the said indictment read, says, that at the time of the taking the said indictment, and long before, he the said A. B. was and ever

(*a*) In cases of treason and felony, no issue is joined with the prisoner on behalf of the crown.

(*b*) The plea should be tendered, engrossed upon parchment, but in some instances such a plea has been allowed when offered *ore tenus*.

(*c*) A plea of misnomers should commence thus, "whereupon cometh R. W. who is indicted by the name of J. W." and if he should say, "the said J. W." he would be concluded. ? Hale, 175.

since hath been, and still is inhabiting, commorant, and resident, in the parish of St. James, in the liberty of Westminster, in the said county of M.; without this, that he the said A. B. now is, or at the taking of the said indictment, or at any time before, was inhabiting, resident, or commorant at the parish of K., in the said county of M., and this he is ready to verify. Wherefore, and because he the said A. B. is not called in the said indictment, A. B. late of the parish of St. James, in the liberty of Westminster, he the said A. B. prays judgment of the said indictment, and that the same may be quashed (d).

328. *Plea of misnomer of the defendant's christian name.*

And Francis Berthe, who is indicted by the name of Thomas Berthe, cometh here into court in his own proper person, and having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, or of any part thereof, prayeth judgment of the said indictment, because he says that he was baptized by the name of Francis, to wit, at the parish aforesaid, in the county aforesaid; and by the christian name of Francis hath always since his baptism been named and called, without this, that the said Francis Berthe now is, or ever was, called or known by the christian name of Thomas, as by the said indictment is supposed; and this the said Francis is ready to verify, wherefore he prays that he may be dismissed by the court of our said lord the king, here upon the premises, *and that the said indictment against him may be quashed.*

329. *Plea, that the defendant has no addition (e).*

And the said A. B. comes in his proper person, and having heard the said indictment read, says, that he, at the time of the taking of the said indictment, and long

(d) It is necessary, under the stat. 4 & 5 Ann. c. 16. s. 11. to verify the truth of the plea by affidavit, or to shew some probable matter to induce the court to believe that such plea

is true. The plea should be signed by counsel.

(e) Note, that as the defect appears on the record, the objection may, it seems, be taken on a motion to quash the indictment, vide Appendix.

before, was and yet is a yeoman; and that the said indictment does not contain an addition of the said estate of the said A. B., nor of any estate, degree, or mystery of the said A. B.; and this he is ready to verify: wherefore, for want of the addition of the estate, degree, or mystery, of the said A. B. in the said indictment, he prays judgment of the said indictment, and that the same may be quashed.

330. *Plea in abatement of a writ of appeal, that there is no such parish as the one named in it.*

Comes and defends the force and injury, when, &c. and all the felony and whatsoever, &c. because, he says, that he the said C. D. is by that writ appealed by the name of C. D. late of the parish of Saint James, Westminster, in the county of Middlesex, gentleman; whereas in truth and in fact, there is a certain parish in the county of Middlesex, called and known by the name of the parish of Saint James, within the liberty of Westminster; but that there is not within the said county of Middlesex, neither was there on the day of obtaining the said original writ of appeal, neither hath there since been, any parish, town, or place, known and called by the name of the parish of Saint James, Westminster, as the said A. B. by his writ aforesaid above supposes, and this he the said C. D. is ready to verify, wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

331. *Special demurrer to an indictment wanting an allegation of time and place.*

And the said A. B. &c. and saith, that our said lord ought not further to impeach or molest him the said A. B. on account of the premises, because he saith, that the said indictment is insufficient in law to put him the said A. B. to answer to the said indictment; and that, by the law of the land, no process ought to be made upon the said indictment against him the said A. B.; for that it doth not appear by the said indictment, upon what certain day, or in what certain place, the offence aforesaid, in the indictment aforesaid, supposed to have been committed by the said A. B., was committed by the said A. B., as by the

law of the land ought to appear; wherefore, for the insufficiency of the said indictment, he prays judgment, and that he may be discharged from the premises by the court here, &c.

332. *Demurrer to an indictment for non-repair of an highway.*

And now, that is to say, on, &c. at, &c. come C. D. and E. F. two of the inhabitants of the said parish, in the name of all the inhabitants of the said parish, by G. H. their attorney, and having heard the said indictment say, that our said lord the king will not, and ought not, further to impeach or trouble the said inhabitants of the said parish, on account of the premises aforesaid; because they say, that the said indictment, and the matters therein contained, are insufficient in law; and that they, the said inhabitants of the said parish, are not bound by the law of the land to answer thereto; whereupon, for the insufficiency thereof, they pray judgment of the said indictment, and that the said inhabitants of the said parish may be discharged by the court here of the premises aforesaid.

333. *Plea of auterfoits acquit to an indictment for burglary and demurrer. (f)*

The said James Vandercomb and James Abbott protest-

(f) In the case of Vandercomb and Abbott, Leach, 816, supra 324.

And see the case of the *King v. Clarke*, 1 Broderip & Bingham, 473. The prisoner pleaded that she had been acquitted on an indictment for murdering a child, by administering a certain deadly poison, to wit, oil of vitriol, and by forcing the child to take, drink, and swallow down, a large quantity of the said oil of vitriol, knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and by that sickness

languished and died. Held (by eleven judges, Wood, B. absent) a good bar to an indictment, (1st count,) for murdering the same child, by administering a large quantity of oil of vitriol, and forcing the child to take into his mouth and throat a large quantity of the said oil of vitriol, knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder choking, suffocating, and strangling, occasioned thereby, languished and died; (2nd count,) for mur-

ing that they are not guilty of the premises charged in the said indictment, demand judgment of the said indictment, and all and every part thereof, they having heretofore, by a jury of the country, in due form of law, been acquitted and discharged of the premises in the said indictment above specified and charged on them; and for plea to the said indictment, say, that our said lord the king ought not further to prosecute them by reason of the premises in the said indictment mentioned; because, they say, that heretofore, to wit, at this now present delivery of the king's gaol of Newgate, now holding for the county of Middlesex, at Justice Hall, in the Old Bailey, in the suburbs of the city of London, they the said James Vandercomb and James Abbott stood indicted by the names and description of James Vandercomb, late of the parish of Saint George, Hanover Square, in the said county of Middlesex, labourer, and James Abbott, late of the same, labourer. For that they, &c. as by the said indictment now here remaining, affiled of record in the said court of the delivery of the said goal of our said lord the king, of Newgate, more fully and at large appears. On which, said indictment they the said James Vandercomb and James Abbott, afterwards, to wit, at the same session of gaol delivery, now holding for the county of Middlesex as aforesaid, in due form of law were tried, and by a jury of the county, then and there in due form of law chosen, and sworn to speak the truth of and concerning the premises in the said indictment last above mentioned specified, then and there, in due form of law, were acquitted and found not guilty of the premises in the said last mentioned indictment specified and charged on them, as they the said James Vandercomb and James Abbott, in their plea to the said last mentioned indictment in that behalf, have alleged; whereupon, it was considered and adjudged by the said last mentioned court there, that they the said James Vandercomb and James Abbott, of the premises in the said last mentioned indictment specified, should be discharged and

dering the child, by administering a certain acid, called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof

he became disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder, occasioned thereby.

go acquitted thereof, and the said James Vandercomb and James Abbott further say, that they the said James Vandercomb and James Abbott, now here pleading, and the said James Vandercomb and James Abbott, in the indictment aforesaid named, and thereof acquitted as aforesaid, are the same identical persons, and not other or different persons; and that the said burglary in the said dwelling house of the said Mercial Nevill and Ann Nevill, in the indictment aforesaid, above pleaded, specified, and supposed to be done and committed by them the said James Vandercomb and James Abbott, is the same identical and individual burglary, as in the said indictment, to which they the said James Vandercomb and James Abbott are now here pleading, is supposed and alleged to have been done and committed by them the said James Vandercomb and James Abbott, and not other or different, to wit, at the parish of Saint George, Hanover Square, aforesaid, and in the county aforesaid, and this they are ready to verify, &c. Wherefore, they pray judgment of the court here, whether our said lord the king will or ought further to prosecute, impeach, or charge them on account of the premises in the said indictment, to which they the said James Vandercomb and James Abbott are now here pleading, contained and specified, and whether they ought further to answer thereunto, and that they may be dismissed this court without delay.

To this plea there was the following demurrer :

And Thomas Shelton, esquire, who prosecuteth for our said lord the king, in this behalf, cometh and saith that, for and notwithstanding any thing in the said plea of the said James Abbott and James Vandercomb, by them above pleaded, our said lord the king ought further to prosecute them the said James Abbott and James Vandercomb, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; because, he saith, that the said plea, and the matters therein contained, are not sufficient in law to bar our said lord the king from further prosecuting them the said James Abbott and James Vandercomb, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; and this the said Thomas Shelton is ready to verify: wherefore, he prays judgment that our said lord the king may further prosecute them the said James Abbott and James Vandercomb, by reason of the premises in the

said indictment, to which the said plea is above pleaded, mentioned, and that the said James Abbott and James Vandercomb may answer over to the same indictment.

To this demurrer there was a joinder as follows:

And the said James Vandercomb and James Abbott being now here as aforesaid, in their proper persons, under the custody of the said sheriff of the county of Middlesex, say, that the said plea of them the said James Vandercomb and James Abbott, in form aforesaid, above pleaded, and the matters therein contained, are sufficient in law to bar our said lord the king from further prosecuting them the said James Vandercomb and James Abbott, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned. And this they are ready to verify, &c. Wherefore, as before, they pray judgment, and that our said lord the king may be barred from further prosecuting, by reason of the premises mentioned in the said indictment; to which the said plea of them the said James Vandercomb and James Abbott is above pleaded; and that they may be dismissed this court without day, &c.

334. *Plea to the jurisdiction upon a trial for high treason under a special commission (g).*

Upon the motion of Charles Hamilton Gordon, esquire, and ——— Jodrell, esquire, being assigned as counsel for the defendants in this cause, and by their consent, and also at the desire and request, and by the consent, of the defendants now at the bar here, and also by the consent of Mr. attorney-general on behalf of the king, it is ordered by the court here, that Richard Foy, the last of the jurors, sworn and impannelled in this cause, be withdrawn out of the panel; and that the rest of the jurors in this cause be discharged, no evidence whatsoever having been given to the said jury in this cause, either on the part of the king or of the defendants. And it is further ordered by the court here, that the said defendants have leave to withdraw their pleas of not guilty by them formerly pleaded,

(g) Foster, 17.

to the indictment in this cause, and have leave to plead to the jurisdiction of this court; and that the said defendants have time till to-morrow to put in such plea, and that they deliver copies of such plea to Mr. Sharpe, solicitor for the king in this cause, by eight of the clock this evening. And thereupon the said defendants do now here at the bar withdraw their said plea of not guilty, in order to put in such plea to the jurisdiction of this court as aforesaid.

And the said Alexander Kinloch, in his own proper person, comes, and, having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, for plea nevertheless saith, that he ought not to be compelled to answer to the said indictment; because he saith, that the kingdom of Scotland, before and until the time of the union of the two kingdoms of England and Scotland, was regulated and governed by the proper laws and statutes of that kingdom, and not by the laws and statutes of the kingdom of England; and that ever since the said union of the said two kingdoms, that part of the realm of Great Britain, called Scotland, hath been, and yet is, governed and regulated by the proper laws of that part of the said realm, called Scotland, and not by the laws of that part of the said realm, called England.

And the said Alexander Kinloch farther saith, that within the said kingdom before the union of the said two kingdoms, and until the said union thereof, and within that part of Great Britain, called Scotland, ever since the said union, there hath been and now is a certain court called the court of justiciary; and that all and singular offences of high treason, committed within the said kingdom of Scotland, before and until the said union, and within that part of the realm of Great Britain, called Scotland, since the said union by the natives thereof, apprehended or taken for such offences there (except peers of the realm of Great Britain), have been, and of right ought to be, inquired of, heard, and determined in the said court of justiciary, before the justices of that court, or in some other courts, or before other justices within the said realm of Scotland, before the union, and within that part of the realm of Great Britain, called Scotland, since the said union; and not in any courts or before any justices within the realm of England, before the said union, or within that part of the realm of Great Britain, called England, since the said union.

And the said Alexander Kinloch farther saith, that Fochabers, in the shire of Murray, in the said indictment mentioned, the place where the said offence contained in the said indictment is supposed to have been committed, before and until the said union of the said two kingdoms was within and parcel of the said kingdom of Scotland, and ever since the said union was and now is lying within and parcel of that part of the realm of Great Britain, called Scotland.

And the said Alexander Kinloch farther saith, that he was born within that part of the realm of Great Britain, called Scotland, to wit, at Fochabers aforesaid; and that at the time when the said offence, in the said indictment contained, is therein supposed to have been committed, and long before that time and since, he the said Alexander Kinloch, was resident and commorant within that part of Great Britain, called Scotland, to wit, at Fochabers aforesaid. And this he is ready to verify. Wherefore the said Alexander Kinloch prays judgment, if the court of our lord the king here will farther proceed upon the indictment aforesaid against him, and that he may be dismissed from the court hereof, and upon the premises, &c.

And the said Sir Dudley Rider, knight, attorney-general of our present sovereign lord the king, who, for our said present sovereign lord the king, in this behalf, prosecuteth, as to the said plea of him the said Alexander Kinloch, by him above pleaded as aforesaid, for our said present sovereign lord the king saith, that the said plea and the matter therein contained, are not sufficient in law to preclude the court here from their jurisdiction to hear and determine the high treason mentioned and specified in the said indictment, and above charged upon him the said Alexander Kinloch, in and by the said indictment. Wherefore, for want of a proper and sufficient answer in this behalf, he prayeth judgment, and that the said Alexander Kinloch may answer in court here to our said present sovereign lord the king, touching and concerning the premises aforesaid.

And the said Alexander Kinloch likewise.

335. *Plea to an appeal of murder, autre-foits convict of manslaughter and admission to his clergy.*

Because he says, that otherwise, to wit, at the general

goal delivery of our lord the king of his county of Cumberland, holden for the county of Cumberland aforesaid, at the city of Carlisle, in the said county, on, &c. before E. W. knight, chief baron of the Exchequer of our said lord the king, and J. T. knight, one of the justices of our said lord the king, assigned to hold pleas before the king himself, justices assigned to deliver the goal of our said lord the king of those being in the said prison, upon the oath of J. B. (*and twenty-one others,*) good and lawful men of the county aforesaid, sworn to inquire and present for our said lord the king and the body of the said county, it was presented, that T. L. late of, &c. gentleman, not having the fear of God before his eyes, but being moved and seduced, &c. (*setting out the indictment*) against the peace of our said lord the king, his crown, and dignity. And that the said T. L. being then and there brought to the bar before the said justices, by J. P. esquire, then sheriff of the county aforesaid, to whose custody he had been before committed, in his proper person comes, and then and there being immediately asked, how he would acquit himself of the premises, by the said indictment above alleged against him, then said, that he was not guilty thereof, and thereof for good and ill then put himself upon the country; and the jury sworn thereupon by the said sheriff in that behalf then and there returned and impannelled, to wit, J. B. gent. &c. being called on, came, who being then taken, tried, and sworn, upon their oath said, that the said T. L. was not guilty of the murder aforesaid, in the indictment aforesaid above specified, in manner and form as he the said T. L. had in his plea above alleged, nor had he ever fled; but the jurors aforesaid, upon their oath aforesaid, then and there did say, that the said T. L. was guilty of the felony and manslaughter only, to wit, of the felonious killing of the said R. A. and that the said T. L. had no goods or chattels, lands or tenements, at the time of the committing of the said felony and manslaughter, or ever afterwards, to the knowledge of the said jurors, as by the record thereof in full force and effect still being, (which record, our lord the king for certain reasons hath caused to come into his court here, before the king himself, by his writ of certiorari, which now remains filed of record in the said court of our lord the king, before the king himself, amongst the indictments of the term of Saint Hilary, in the ——— year of the reign of our said lord the king.)

amongst other things fully appears; and the said T. L. further saith, that no judgment of and concerning the premises in the said indictment alleged against him, was pronounced at the said general gaol delivery; but the said T. L. further saith, that he the said T. L. then was and yet is a clerk, and then and there at the said general goal delivery of the county of Cumberland aforesaid, before the justices assigned to deliver the said gaol, demanded (h) that the benefit of clergy should be allowed him for the manslaughter aforesaid, whereof he was then convicted by a jury of the country as aforesaid, and offered himself and was ready to read as a clerk, if the court would admit him to the book for that purpose; and the said T. L. further saith, that afterwards, to wit, on Monday next after the morrow of the purification of the Blessed Virgin, in the term of Saint Hilary, in the eighth year of the reign of our said lord the now king, in the said court of our said lord the king here, before the king himself, came the said T. L. in his proper person, in the custody of the marshal of the marshalsea of our lord the now king, in the court of our lord the now king, before the king himself, into whose custody the said T. L. before, to wit, on, &c. being brought here to the bar by virtue of a writ of our said lord the king of *habeas corpus ad subjiciendum*, &c. directed to the sheriff of the said county of Cumberland, was then and there by the said court committed, and is committed to the custody of the said marshal; and immediately by the said court here being asked if he had any thing to say for himself, why the said court of our said lord the king, before the king himself, should not proceed to judgment and execution, against the said T. L. of and concerning the aforesaid conviction of manslaughter in the said record, for the death of the said R. A. which said record our said lord the king had for certain reasons caused to be removed, by his writ of certiorari, into the said court of our said lord the king, before the king himself as aforesaid; and which did then and still does remain in the said court of our said lord the king, before the king himself. And the said T. L. then and there (i) said, that he was a clerk,

(h) The prayer, under the stat. 5 Ann. c. 6. would now be, "that the benefit of the statute, in that case made and

provided, might be allowed him."

(i) Under the stat. 5. Ann. c. 6. the entry would now be,

and then and there prayed the benefit of clergy to be allowed him; and thereupon, the book being then and there delivered by the said court to the said T. L. the said T. L. did then and there read as a clerk; and it was then and there considered by the said court, that the said T. L. should be burnt upon his left hand, and the said T. L. was then and there burnt on his left hand, as by the record thereof, in the said court of our said lord the king, before the king himself, fully appears. And this he the said T. L. is ready to verify, wherefore he prays judgment if the said J. A. ought to have or maintain his said appeal against him the said T. L. concerning the death aforesaid, &c. with this, that he the said T. L. is willing to verify, that he the said T. L. now appealed, and the said T. L. in the said indictment above named, and in form aforesaid, convicted and burnt in the hand, are one and the same person, and not another or different person, and that the wound of which the said R. A. is supposed in the said appeal to have died, and the said wound of which the said R. A. is supposed in the said indictment to have died, are one and the same wound, and not other and different wounds, and he prays allowance of the premises. And as to the felony and murder aforesaid, the said T. L. saith, that he is not guilty thereof, and thereof for good and ill he puts himself upon the country, &c. and the said J. A. doth the like, &c.

336. *Plea by the inhabitants of a county for not repairing one half of a public bridge, that certain persons being liable ratione tenuræ to repair an ancient timber bridge there, which was washed away by a flood, built half of the present bridge, and are liable to the repairs (k).*

And now, that is to say, on Friday next, after the octave of Saint Hilary, in this same term, before our said lord the king, at Westminster, R. C. and J. W., two of

that the benefit of the statute, "in such case made and provided, might be allowed to him, and the same was allowed to him accordingly, and thereupon it was considered, &c." A person convicted of manslaughter

is still liable to be burnt in the hand.

(k) In the case of the *King against the Inhabitants of the West Riding of Yorkshire*, 2 East. 353, n. (u), the inhabitants were indicted for the non-repair of a public carriage

the inhabitants of the said county of S., come by — their clerk in court, as well by themselves as all other the inhabitants of the said county, except Sir T. D. Ackland, &c. and having heard the said indictment read, say, that the inhabitants of the said county of S. (except as before excepted) ought not to be charged with the repairing or amending the said part of the said bridge so lying in, &c. as in the said indictment mentioned, being the half part thereof lying therein, and thereby supposed to be in great decay, broken, and ruinous; because protesting that the said bridge in the said indictment mentioned, is not nor ever was such common public bridge as by the said indictment is above supposed for plea in this behalf, they say, that long before the first time in the said indictment mentioned, and during all the time in the said indictment mentioned, and wherein it is thereby supposed, that the said part of the said bridge was in great decay, broken, and ruinous, the said Sir T. A., &c. were severally and respectively seised in their several and respective demences as of fee of and in the several and respective lands and tenements hereinafter respectively mentioned, with their appurtenances, viz. the said Sir T. A., of and in 50 acres of land with the appurtenances, called Vipley, and also of and in two other acres of land with the appurtenances, called Blacklands; and also of and in a certain tenement with the appurtenances, called Exbridge house, lying and being in the parish of, &c. and the said — of and in, &c. and the said R. C. and J. W. further say, that a certain public timber bridge, from time whereof, &c. until the said destruction thereof hereinafter mentioned, was erected,

bridge, plea that certain townships were liable, by prescription, to the repair of the bridge. It appeared upon the trial that until the year 1745 the bridge, which till then was merely a foot bridge, had then been enlarged by the townships into a horse bridge at their expense, and in 1755 had been again enlarged by the townships into a carriage bridge. After a verdict for the defendants, the court of K. B. granted a new trial, for

the townships could not be bound by prescription to repair a carriage bridge, which had been constituted within time of memory. Buller, J. said, where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge, but still he shall only be bound to repair it as a foot bridge that is *pro rata*. And therefore *quod* as to the validity of the above plea.

made, and standing over the said river, called the river Ex., one half whereof was in the parish of B., in the county of S. aforesaid, in the king's highway, mentioned in the said indictment, for all the liege subjects of this realm, to go, return, pass, and repass, over, on foot, and with their horses and cattle, at all times, at their free will and pleasure; which said timber bridge long before any of the times in the said indictment mentioned, to wit, on —, 1748, was by the violence and rapidity of the said river Ex broken down, destroyed, and carried away, and that the then several tenants of the lands and tenements herein above mentioned, now to be in the tenures of Sir T. A. &c. did in the place of the same timber bridge, and on the spot where the same had been erected or stood erect and set up, the said part of the said bridge in the said indictment specified, viz, at, &c. aforesaid. The remaining part thereof being erected and built by divers other persons, to whom it then and there of right belonged to repair the part of the said timber bridge not being in the said parish of B., in the said county of S. And the said R. C. and J.W. further say, that the several tenants of the several lands and tenements herein above mentioned to be in the tenure of the said Sir T. A., &c. for the time being, by reason of their tenure of the said several lands and tenements, from time whereof, &c. until the destruction of the said public timber bridge herein above mentioned, ought to have repaired and amended, and used and were accustomed to repair and amend the said half part of the said public timber bridge, standing in the said parish of B. in the said county of S., as often as occasion has required, and from the time of erecting and building the said bridge, in the said indictment mentioned, by reason of the premises, ought to have repaired and amended, and were used and were accustomed to repair and amend, and have repaired and amended; and the said Sir T. A., &c. by reason of the premises; still ought to repair and amend the said part of the said bridge in the said indictment specified, when and as often as occasion requires; without this, that the inhabitants of the said county of S. ought to repair and amend the said half part of the said bridge, lying and being in the said parish of B., in the said county of S. aforesaid, and this the said R. C. and J.W. are ready to verify, wherefore they pray judgment, and that the inhabitants of the said county of S. (except as before excepted) may be dismissed and discharged by the court here therefrom, &c.

337. *Plea by two of the inhabitants of a parish that they are not guilty as to part of the road in question, and as to the rest, that it ought to be repaired by particular individuals, by reason of the inclosure of certain lands.*

And A. B. and C. D. two of the inhabitants of the said parish of M. for themselves and the rest of the inhabitants of the said parish of M. except E. F., G. H., and I. K. come, and having heard the said indictment read, say, that as to certain part of the said highway, in the said indictment specified, and therein mentioned to be ruinous and in decay, beginning at A. and extending from thence to B. in the said indictment mentioned, and therein alleged to be ruinous and in decay as aforesaid, they are (1) not guilty of the premises in the said indictment specified, above laid to their charge, as by the said indictment is above supposed, and of this they put themselves upon the country, &c.; and as to the residue of the same highway, they say, that they do not intend, that our said lord the king will further proceed against the said inhabitants of the said hamlet of M. or any of them, except the said E. F. and G. H. and I. K. by reason of the premises in the said indictment specified; because they say, that the said residue of the said highway, in the said indictment mentioned, and therein alleged to

(1) Upon a plea of not guilty, the parish may shew that the road in question is in repair, or that it is not an highway, or that it does not lie within the parish, for these facts the prosecutor is bound to prove, and therefore they may be disproved by the defendant. 1 Str. 181. But the parish being *prima facie* bound by the law of the land to repair all highways lying within it, must, in order to discharge itself of that liability, throw the burden upon others, 1 Vent. 189. Katherine Austin's case, 1 Ld. Ray. 725. 2 T. R. 111. And for this purpose it is ne-

cessary to disclose the ground on which they claim to be discharged, in a special plea. 1 Haw. c. 76. s. 9. 1 Mod. 112. 1 Vent. 256. 2 Saund. 159. n. 10. and so strongly does this common law liability attach, that where persons charged with the repair of an highway by act of parliament become insolvent (1 Ld. Ray. 725.) or particular individuals formerly liable by prescription, are exempted from the charge by legislative provision, the burthen immediately devolves upon the parish at large. 2 Ld. Ray. 1169, 2 Saund. 159. n. 2.

be ruinous, miry, deep, broken, and in decay, adjoins, and from time whereof the memory of man is not to the contrary hath adjoined to, certain lands in the parish of M. aforesaid, now and at the time of the taking of the said inquisition, in the several occupations of the said E. F. and G. H. and I. K.; and that the said residue of the said highway, in the said indictment mentioned, and therein alleged to be ruinous, deep, miry, broken, and in decay as aforesaid, from time whereof the memory of man is not to the contrary, until the inclosure thereof hereinafter mentioned, was a certain common king's highway, upon and leading over a certain piece of open and uninclosed ground, called ———, of which the said several lands, in the several occupations of the said E. F., G. H., and I. K. were parcel, and not separated or divided from the same by any fence or inclosure. And that afterwards, to wit, on, &c. (m) the same residue of the same highway was inclosed on both sides thereof by certain fences, then erected and made in and upon the said respective lands, now in the occupation of the said E. F. and G. H. and I. K. and continually from that time hitherto hath continued, and still continues (n), so inclosed as aforesaid; and at the time of the taking the said indictment, and continually from thenceforth hitherto hath been, and still is continued so inclosed by the said E. F., G. H., and I. K. respectively, by and with the respective fences of their said respective lands. And that the said E. F., G. H., and I. K. respectively, by reason of their said continuance of the said inclosure of the said residue of the said highway, so being ruinous and in decay as aforesaid, ought to have repaired and amended, and still ought to repair and amend, the said residue of the same highway, so long as they have continued and shall continue the said inclosure, in manner following, that is to say, the said E. F. ought to repair and amend so much of the said residue of the said highway throughout the whole breadth thereof, as hath been so continued inclosed by him, on both sides thereof as aforesaid; and so much thereof as hath been so continued inclosed by

(m) About the time of the inclosure.

(n) This is necessary, since if a person bound to repair an highway, in consequence of his

inclosure of the adjacent land, lay it open again, he gets rid of the obligation. 1 Haw. c. 76. s. 7, and *supra*. 779.

him on one side thereof only, the said E. F. ought to repair the same highway, on that side thereof, as far as the middle of the same highway (o): and the said G. H. and I. K. respectively ought, in like manner, to repair the respective parts of the said residue of the said highway adjoining to the said respective inclosures, so continued by them respectively as aforesaid, throughout the whole breadth thereof; where the same is so inclosed by them respectively on both sides thereof, and where the same is so inclosed by either of them on one side thereof only, then the said G. H. and I. K. respectively ought to repair the same respective parts, so inclosed by either of them on one side, on such respective side only as far as the middle of the same highway, so long as their said respective inclosures shall be continued by them respectively as aforesaid; and this the above-mentioned A. B. and C. D. for themselves and the rest of the inhabitants of the said parish of M. (except as aforesaid) are ready to verify (p); wherefore they pray judgment of the court here, and that they may be dismissed and discharged of the premises in the said indictment above specified.

338. *Plea by a parish, that the road in question is a new road, made by virtue of an act of parliament, alleging a custom for particular townships, and of particular districts in one of them townships, to repair their own highways, and alleging that the other highways in that township were repairable by particular individuals, ratione tenuræ, and that the highways in question were so repairable, no determination as to the repairs having been made in pursuance of the recited act.*

And hereupon A. B. and C. D. two of the inhabitants of the said parish of B. by ———, their attorney, come, and having heard the said indictment read, say that they do not intend that our said lord the king will further proceed against the inhabitants of the said parish of B. upon the said indictment, by reason of the premises in

(o) See note (r), p. 779.

(p) If a parish be indicted for not repairing an highway, or a county for not repairing a bridge, and throw the charge upon another, the plea ought

not to traverse the obligation to repair; for it would be a traverse of a matter of law, and therefore demurrable. See 1 Saund. 23. 2 Saund. 150 n. 10.

the indictment aforesaid above specified, because they say* that the said parts of the said common highway, so being in decay as in the said indictment is specified, during all the time aforesaid, and also at the time of passing a certain act of parliament made and passed in the 47th year of the reign of our said lord the king, entitled, "An act to continue, &c." (*setting out the title of the act,*) were, and from thence hitherto have been, and still are, parts of the diverted, or new line of road in the said act made and passed in the 47th year aforesaid mentioned, and that the said parish of B., now is and at the time of taking the said inquisition was, and from time whereof the memory of man is not to the contrary, hath been divided into divers, to wit, seven districts and different townships, to wit, E. F., G. H., &c. And that within the said township of H. there now are, and from time whereof the memory of man is not to the contrary, there have been divers, to wit, three distinct and different districts, to wit, one district there called M. one other district there called N. and one other district there called O.; and that within the said township of H. but not within the said several districts thereof, there now are, and from time whereof the memory of man is not to the contrary, there have been certain lands and tenements respectively called P., Q., R., S., &c. And the said A. B. and C. D. further say, that within the said parish there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom there, during all the time aforesaid used and approved of, with respect to the repairing of all and every the king's common highways within the said parish, that would, but for the said custom, be repairable by the inhabitants of the said parish of B. at large, that is to say, that the same respectively should be, and the same respectively have, during all the time aforesaid, been, and during all the time aforesaid of right ought to have been, and still of right ought to be repaired and amended by the inhabitants of the respective townships, within which the same respectively lie, or of some district thereof, within which the same respectively lie, and not by the inhabitants of the said parish at large; and that the said inhabitants of each respective township should be, and they have during all the time aforesaid been, and of right ought to have been, and still of right ought to be, exempted and discharged from the repairs of the said king's

common highways, lying and being within the said parish, out of their own respective townships. And the said A. B. and C. D. further say, that all and every the common king's highways lying and being within the said township of H. that would otherwise and but for the custom aforesaid, have been repaired by the inhabitants of the said parish at large, have from time whereof the memory of man is not to the contrary, until the making of the said diverted or new line of road, been repaired and amended, and have been used and accustomed to be repaired and amended, and from that time hitherto, except so far as the liability to repair the same is altered by the effect and operation of the said respective acts of parliament, of right ought to have been, and still of right ought to be repaired and amended, in manner following, that is to say, the same common king's highways lying within each of the said districts, by the inhabitants of each respective district repairing and amending the same common king's highways lying within their own respective districts; and the said A. B. and C. D. further say, that all and every the common king's highways lying and being within each of the same respective lands and tenements, respectively called P., Q., R., &c. have, from time whereof the memory of man is not to the contrary, until the making of the said diverted or new line of road, been repaired and amended, and have been used and accustomed to be repaired and amended, and from that time hitherto, except so far as the liability to repair the same is altered by the effect and operation of the said respective acts of parliament, of right ought to have been, and still of right ought to be, repaired and amended by the respective occupiers of those respective lands and tenements, by reason of the tenure of the said respective lands and tenements, in manner following, that is to say, the same common king's highways lying within the said lands and tenements called P. by the occupiers of those lands and tenements, and the same common king's highways lying within the said lands and tenements respectively, called Q. and R. or either of them, by the several and respective occupiers of those respective lands and tenements jointly. And the said A. B. and C. D. further say, that before and until the making of the said diverted or new line of road, part of the said old road from R. to B. in the said act mentioned, to wit, of the length, &c. and of the breadth, &c. did lie within the said township of H. and out of the

said districts, and within the lands and tenements called P. and which, during all the time in the said indictment mentioned, was, and still is, in the occupation of S. T. and one U. W. and also one other part of the same road, to wit, of the length, &c. and of the breadth, &c. did lie within the said township of H. and out of the said districts, and within the same lands and tenements called Q. and which, during all the time in the said indictment mentioned, was, and still is, in the occupation of one M. A.; and that the said part of the said common king's highway in the said indictment first mentioned, did, during all the time last aforesaid, lie, and still does lie, within the lands and tenements called R. and within the said township of H.; and that the said part of the said common king's highway in the said indictment secondly mentioned, did, during all the time last aforesaid, lie, and still does lie, within the said lands and tenements called S. and within the said township of H.; and that no determination hath been made by any two justices of the peace, according to the form and effect of the said act of parliament passed in the 47th year aforesaid, what part or parts of the said new road should be repaired by the respective parties interested therein; and liable to repair the same respectively; and this the said A. B. and C. D. are ready to verify, wherefore they pray judgment, &c. (*as in the last pr.*)

339. *Plea, that the parish consists of several townships, each of which is bound by custom to repair its own roads. (q)*

And A. B. and C. D. two of the inhabitants of the

(q) Where different districts in a parish have for time immemorial been accustomed to repair the highways lying within them, the prescription should be pleaded to an indictment against the parish at large, for the parish would be concluded by a judgment against it, unless *fraud*, *R. v. St. Pancras*, Peake, N. P. 219. want of notice, &c. Doug. 421. *R. v. Townsend*,

1 Saund. 159. n. 10. *R. v. Leominster*, could be shewn in order to rebut such a conclusion. Mr. Serjeant Williams was of opinion, 2 Saund. 159. n. 10. that each district should separately plead the prescription and claim the exemption, as was done in an issue tried before Mr. J. Heath, at Heref. S. A. 1800, in the case of *R. v. the inhabitants of Leominster*.

parish of B. by M. N. their attorney for themselves and the rest of the inhabitants of the said parish, except the inhabitants of the townships of C. and H. hereinafter mentioned, come, and having heard the said indictment read, say, that they do not intend that our said lord the king ought further to proceed against the inhabitants of B. except as aforesaid, by reason of the premises in the said indictment specified, because they say that the said parish of B. now is, and at the time of the taking of the said inquisition was, and from time whereof the memory of man is not to the contrary hitherto hath been divided into divers, to wit, seven districts and different townships, that is to say, one township there called C. and one other township there called H. and that within the said parish there now is, and at the time of the taking the said inquisition there was, and during all the time aforesaid there hath been, a certain ancient and laudable custom there during all the time aforesaid used and approved of, that is to say, that the inhabitants of each of the said several townships, from time whereof the memory of man is not to the contrary, have repaired, maintained, and amended, and have used and been accustomed to repair, maintain, and amend, and during all the time aforesaid of right ought to have repaired, maintained, and amended, and still of right ought to repair, maintain, and amend, all and every the king's common highways lying and being within their own respective townships, that would be otherwise repairable by the inhabitants of the said parish of B. at large, when and as often as necessary; and that the inhabitants of the said parish at large have not, during all or any part of the time aforesaid, repaired, maintained, or amended, and have not been used or accustomed to repair, maintain, or amend, and of right ought not to repair, maintain, or amend the king's common highways within the said parish, or any of them or any part thereof. And the said defendants further say, that so much of the said common king's highway in the said indictment mentioned, and therein alleged to be ruinous and in decay, as beginning at M. in the parish aforesaid, extends from thence eastwards, for the length of ——— yards, now is, and during all the time aforesaid, hath been situate and lying within the said township called C. and during all that time was and is one of the king's highways in that township, that, but for the said custom, would be repairable by the inhabitants of

the said parish at large; and that the same part of the said highway, during all the time aforesaid, of right has been repairable, and during all that time ought to have been repaired, maintained, and amended, and still of right ought to be repaired, maintained, and amended, by virtue of the said custom, by the inhabitants of the said township called C. when and as often as necessary, and not by the inhabitants of the said parish of B. at large: and that the residue of the said highway in the said indictment mentioned, and therein alleged to be ruinous and in decay, now is, and during all the time aforesaid has been, situate and lying within the township called H. and during all that time was and is one of the king's common highways in that township, that, but for the said custom, would be repairable by the inhabitants of the said parish at large, and that the same part of the said highway, during all the time aforesaid, of right hath been repairable, and during all that time ought to have been repaired, maintained and amended, and still of right ought to be repaired, maintained, and amended, by virtue of the said custom, by the inhabitants of the said township, called H., when and as often as necessary, and not by the inhabitants of the said parish at large; and this the said A. B. and C. D. are ready to verify, wherefore they pray judgment, &c. (*as before*).

340. *Plea to a presentment that a particular liberty within the parish ought to repair, and not the parish at large (r).*

(*Commencement as in pr. 338.*) Say, that within the parish of S. M. aforesaid, there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain liberty or district, called —, wherein there now are, and immemorially have been, divers inhabitants, and that the said part of the said highway in the said presentment above specified, and thereby supposed to be out of repair, now lies, and during all the time aforesaid hath lain, within the said liberty or district, to wit, at the parish aforesaid. And the said A. B. and C. D. further say, that the inhabitants of the said liberty or district, from time whereof the memory of man

(r) Vide supra 692, 3. 798.

is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and during all the time aforesaid ought to have repaired and amended, and still of right ought to repair and amend, all the common highways within the said liberty or district as often as occasion requires, by reason whereof the inhabitants of the said liberty or district ought to have repaired and amended the part of the said highway in the said presentment specified, and thereby supposed to be out of repair; and this the said A. B. and C. D. are ready to verify and prove as the court shall direct, wherefore they pray judgment, &c.

341. Plea by a township to an indictment for not repairing a highway, confession as to part, not guilty as to the rest.

And A. B. and C. D., &c. say, that as to so much of the said highway in the said indictment mentioned, and therein supposed to be ruinous, miry, deep, broken, and in decay, as lies betwixt the said place in the said indictment mentioned, called B. G. and a certain place at the township of C. aforesaid, called S. H. containing in length ——— yards, they cannot deny that they are guilty of the premises in that behalf above laid to their charge in manner and form as by the said indictment is above supposed and alleged; and as to the rest of the premises, by the said indictment above laid to their charge, they say for themselves and the rest of the inhabitants of the township of L. aforesaid, that they are not guilty thereof in manner and form as in and by the said indictment is above supposed, and of this they put themselves upon the country, &c.

342. Plea that particular persons ought to repair particular parts of the highway.

And A. B. and C. D. two of the inhabitants of the said parish of L. for themselves and the rest of the inhabitants of the same parish, (except E. G., G. H., I. K., L. M., &c.) come, and having heard the said indictment read, say, that they do not intend, that our said lord the king should further proceed against the inhabitants of the said parish of L. or any of them, (except, &c.) by reason of the premises in the said indictment specified; be-

cause they say, that the said part of the said highway, in the said indictment mentioned, and therein alleged to be ruinous and in decay, adjoineth, and from time whereof the memory of man is not to the contrary, hath adjoined, to certain lands in the parish of L., called End Fields, now in the several tenures or occupations of the said E. F., G. H., &c.; and that the said part of the said highway ought to be repaired by the said E. F., G. H., &c. and in the respective parts and proportions following, (that is to say,) as for and concerning such part of the said highway, throughout the whole breadth thereof, as far as the same is adjoining to the aforesaid lands, in the possession of the said E. F., he the said E. F. ought to repair the same; and as for and concerning such part of the said highway throughout the whole breadth thereof, as far as the same is adjoining to and is between the aforesaid lands of the said E. F. on the north west side of the said road, and the aforesaid lands in the possession of the said G. H. on the south east side thereof, they the said E. F. and G. H. ought to repair the same; and as for and concerning such parts of the said highway, throughout the whole breadth thereof, as far as the same is adjoining on both sides thereof to the aforesaid lands in the possession of the said G. H., he the said G. H. ought to repair the same; and as for and concerning the residue of the said part of the said highway so in decay as aforesaid, the said I. K. ought to repair the same; which said several and respective parts and proportions of the said parts of the said highway, so alleged to be ruinous and in decay as aforesaid, the said E. F., G. H., and I. K. ought respectively to repair and amend as aforesaid, by reason of their tenure of their said respective lands next adjoining unto the said part of the said highway in the said indictment mentioned, and therein alleged to be ruinous and in decay, as all those who held the respective lands ought and were wont to do, from time whereof the memory of man is not to the contrary (s); and this the above named A. B. and C. D. for themselves and the rest of the inhabitants of the inhabitants of the said parish of L. (except the said E. F., G. H., and I. K.) are ready to verify, wherefore they pray judgment, &c.

(s) This is unnecessary, see p. 693, note (q).

343. *Plea by an individual to an indictment for not repairing a highway or bridge.*

And the said A. B. by ——— his attorney, comes, and having heard the said indictment read to him, says, that he is *not guilty* (t) of the premises in the said indictment specified, above laid to his charge, and of this he the said A. B. puts himself upon the country.

344. *Plea by a county (to an information) that an individual is bound to repair a bridge.*

That the inhabitants of the said county ought not to be charged with the repairing and amending of the said bridge, because they say, that otherwise, to wit, by a certain inquisition taken for our said lord the king, at C. in the said county, on, &c. before M. H. knight, then chief justice of our said lord the king, assigned to hold pleas before the king himself, T. T. knight, then and still being one of the justices of our said lord the king, assigned to hold pleas before the king himself, and W. H. baronet, and others their companions, &c. (*setting out the caption, the indictment, conviction, and judgment*), as by the record and proceedings thereof, which our said

(t) Whenever a defendant is charged with the repair of an highway or bridge against common right, it is competent to him to enter into a full defence under the general plea of not guilty; as where an individual or township is charged with the non-repair of an highway or a particular district, within a county, with the omission to repair a bridge. 1 Str. 180. *R. v. city of Norwich*, 3 Salk. 183. *R. v. St. Andrews*. *R. v. Wheaten Aston*, cited 2 Saund. 159. n. 10. For upon this issue it is incumbent upon the prosecutor to

prove the liability of the defendant by tenure, &c. as stated in the indictment. But if the defendant will unnecessarily plead special matter in defence, he must shew in his plea who ought to repair. *R. v. Yarton*, 1 Sid. 140. Carth. 218. *R. v. Hornsey*. But such a plea differs from that of a parish in this respect, that in the former case it is necessary to traverse the obligation to repair. 2 Saund. 159. n. 10.; but still the plea would be demurrable, since it would amount to no more than the general issue.

lord the king for the correction of error hath lately caused to come into the court of our said lord the king, before the king himself, now remaining in the said court of our said lord the king here, at Westminster, plainly appears; and that the said A. B. and C. D. two of the inhabitants of the county aforesaid, in the name of all the inhabitants of the said county, further say and will verify, that the said bridge in the record of the said judgment mentioned, and the bridge in the information aforesaid mentioned and expressed, is one and the same bridge, and not another and different bridge, and that the judgment aforesaid yet stands and remains in all respects in full force, vigour, and effect, not reversed or otherwise impeached, and this the said A. B. and C. D. two of the inhabitants of the county aforesaid, are ready to verify, wherefore they pray judgment, and that the said inhabitants of the county of E. may be discharged of the premises aforesaid, contained in the said information, and by the court here may be dismissed (u).

345. *Demurrer to a plea to an indictment against a county for not repairing a public bridge.*

And J. K., esq. (x) clerk of the assizes for the city aforesaid, who prosecutes for our said lord the king, in this behalf, as to the said pleas of the said J. A. and R. C. in behalf of themselves and the rest of the inhabitants of the said county of Surrey, (except the inhabitants of the hamlet of I., in the parish of A., in the said county of S., by them above pleaded to the said first count of the said indictment) says, that notwithstanding any thing in that plea alleged, our said lord the king ought further to impeach and prosecute the inhabitants of the said county of S. in the premises. Because, he says that the said plea, in manner and form as the same is above pleaded and the matter therein contained are not sufficient in law to discharge the inhabitants of the said county of Surrey from the repairing and amending the said part of the said bridge, in the first count of the said indictment mentioned, and

(u) The attorney-general demurred, and judgment was given for the king, because the bridge mentioned in the information was alleged to be in

one parish, and the bridge mentioned in the indictment was in another. See Trem. B. C. 207.

(x) Vide 1 Sid. 230.

therein alleged to be in decay, and this the said ——— for our said lord the king, is ready to verify. Wherefore, for want of a sufficient plea in this behalf he prays judgment, and that the inhabitants of the said county of Surrey may be charged with the repairing and amending of the same part of the said bridge in the first count of the said indictment mentioned.

346. *Joinder in demurrer.*

And M. N. who prosecutes for our said lord the king on this occasion, for our said lord the king saith, that the said indictment, and the matters therein contained, are good and sufficient in law to compel the inhabitants of the said parish to answer to the same; which said indictment, and the matters therein contained, the said M. N. who prosecutes for our said lord the king, is ready to verify, as the court, &c.; and because the said inhabitants do not answer the said indictment, nor in any wise deny the same, the said M. N. who prosecutes for our said lord the king, for our said lord the king prays judgment, and that the said inhabitants may be convicted, &c.

347. *Counter-plea to a plea praying the benefit of the statute, that the benefit of the statute has already been allowed.*

And the said W. C. esquire, attorney-general for our said lord the king for the county palatine of Lancaster aforesaid, who prosecuteth for our said lord the king in this behalf as aforesaid, having heard S. B. who stands convicted at this present session of hearing and determining and general delivery, now here holding for the county palatine of Lancaster, of unlawfully and feloniously, and against the form of the statute, putting off, (*setting out the offence in the indictment, as in p. 170.*) pray that the benefit of the statute in such case made and provided may be allowed to the said S. B. saith that the said S. B. is not entitled to the benefit of the statute in such case made and provided, because she the said S. B. otherwise called S. M. by the name and description of S. B. late of, &c. singlewoman, heretofore, to wit, at the general session of assizes of our sovereign lord George the third,

then (y) king of Great Britain, France, and Ireland, defender of the faith, and so forth, of hearing and determining and general goal delivery, held at the castle of Lancaster, in and for the said county palatine of Lancaster, on, &c. before his majesty's trusty and well beloved Sir Soulden Lawrence, knight, one of the justices of our said sovereign lord the king of his majesty's Court of King's Bench, at Westminster, chief justice of our said sovereign lord the king of his majesty's Court of Common Pleas within the said county palatine of Lancaster, and chief justice of all manner of pleas within the said county palatine assigned to be held, heard, and determined, and his majesty's trusty and well beloved Sir Simon Le Blanc, knight, one other of the justices of our said sovereign lord the king of his majesty's Court of King's Bench, at Westminster, one of the justices of our said sovereign lord the king of his majesty's said Court of Common Pleas within the said county palatine of Lancaster, and one of the justices of all manner of pleas within the said county palatine assigned to be held, heard, and determined, and others their companions, justices, and commissioners of our said sovereign lord the king, by the letters patent of him the said lord the king, under the seal of the said county palatine of Lancaster, to the said Sir Soulden Lawrence and Sir Simon Le Blanc and others, or any two or more of them directed, whereof the aforesaid Sir Soulden Lawrence and Sir Simon Le Blanc, amongst others our said lord the king would have to be two, as well to hear and determine as inquire by the oaths of honest and lawful men of the said county palatine of Lancaster, and by other ways, means, and methods, which they could as well within liberties as without, by which the truth of the matter might be better known and inquired of, all treasons, misprisions of treason, insurrections, rebellions, murders, felonies, homicides, burglaries, manslaughter, rapes of women, unlawful congregations and conventicles, unlawful speaking of words, coadjunctions, misprisions, confederacies, false allegations, trespasses, riots, routs, retainings, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and other misdemeanors, offences, and injuries whatsoever, and of the accessories to the same within the county aforesaid, as well against the

(y) The first conviction was before the union.

form of the statutes as against the common law, by whatsoever and however had, made, perpetrated, or committed, and by whom and to whom, when, how, and after what manner, and of other articles and circumstances, the truth of the premises or any of them in any wise concerning, and the same treasons and other the premises to hear and determine, and the gaol there to deliver, according to the law and custom of the kingdom of our said sovereign lord the king, assigned, and so forth, was tried upon an indictment. For that she the said S. B. being a person of evil name and conversation, and intending to deceive and injure the liege subjects of our said lord the king, to wit, on, &c. with force and arms, at, &c. 20 pieces of false and counterfeited milled money and coin, each and every of them made and counterfeited to the likeness and similitude of a piece of good, lawful, and current milled money and silver coin of this realm called a shilling, the same counterfeited pieces of money or any of them not being then cut in pieces, then and there unlawfully and feloniously did take and receive of and from one P. M. at a lower rate and value than the said counterfeited pieces of milled money did by their denomination import and were coined and counterfeited for, that is to say, for five pieces of current silver money and coin of this realm called shillings, being of the value of 5s. against the form of the statute, &c. and against the peace, &c. And the said S. B. was thereof convicted, and prayed that the benefit of the statute in such case made and provided might be allowed to her the said S. B. and the same was allowed to her accordingly, and it was considered by the court there, that the said S. B. should be fined one shilling, and imprisoned one year, which he the said W. C. attorney-general for our said lord the king for the said county palatine of Lancaster, is ready to verify and prove by the record thereof; and that the said S. B. who stands convicted at the present general session of assizes and general gaol delivery, now here holding for the county palatine of Lancaster, is the same person who was convicted at the said general session of assizes and general gaol delivery, holden at the castle of Lancaster, in and for the said county palatine of Lancaster, on, &c. and not another or different person; wherefore, since the said S. B. hath already received the benefit of the statute and been admitted to her clergy, the said W. C. esq. attorney-general for our said lord the king for the said county pala-

tine of Lancaster, prayeth judgment of the court here, and that the said S. B. may receive judgment to die according to law.

348. *Certificate of the former conviction.*

These are to certify, that at the session of our lord the king, of oyer and terminer and general gaol delivery, held for our said lord the king at K. in and for the county of S. on, &c. before, &c. and others their fellows justices of our said lord the king, assigned to hear and determine and to deliver the said gaol of the prisoners therein being, A. B. late of, &c. labourer, was tried upon an indictment, for that he the said A. B. on, &c. with force and arms, at, &c. in the county aforesaid, one piece of copper money of this realm, called an halfpenny, then and there unlawfully and feloniously did make, coin, and counterfeit, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity: and further, that he the said A. B. on, &c. with force and arms, at, &c. one piece of false, feigned, and counterfeit copper money, to the likeness and similitude of the good, legal, and current copper money of this realm, called an halfpenny, then and there unlawfully and feloniously did make and coin, against the form, &c. and against the peace, &c.; and was thereupon convicted, and prayed that the benefit of the statute in such case made and provided might be allowed to him the said A. B. and the same was allowed to him accordingly; and it was thereupon ordered by the said last-mentioned court, that he pay a fine of one shilling to our said lord the king, and be imprisoned in the gaol of our said lord the king for the said county, for the space of nine months, as appears by the records of my office, dated the ——— day of ———, in the year of our Lord ———.

M. N. clerk of
assize.

349. *Replication, denying the liability ratione tenuræ.*

And M. N. esquire, coroner and attorney of our said sovereign lord the king, in the court of our said lord the king, before the king himself, who prosecuteth for our said lord the king in this behalf, for our sovereign lord the king saith, that by any thing in the said plea above alleged, our said lord the king ought not to be barred from prosecuting the said indictment against the said inhabitants of the said

parish of L. in the said county of M. because, protesting that he doth not acknowledge any thing in the said plea to be true for plea in this behalf, for our said lord the king saith, that the said E. F. by reason of his tenure of the said lands and tenements in the said plea mentioned, ought not to repair the said part of the said highway by the said indictment supposed to be out of repair, as in the said plea is above alleged; and this the said coroner and attorney of our said lord the king, for our said lord the king prayeth may be inquired of by the country; and the said A. B. and C. D. two of the inhabitants of the said parish of ———, for themselves and the rest of the inhabitants of the said parish do the like.

350. *Replication, traversing the custom alleged in the plea, that particular divisions of a parish ought to repair.*

And the said W. C. king's serjeant at law, attorney general of our said lord the king of his county palatine of Lancaster, who prosecutes for our said lord the king in this behalf, saith, that by reason of any thing by the said A. B. and C. D. above in pleading alleged, our said lord the king ought not to be precluded from maintaining his said indictment against the inhabitants of the said parish of L. because he saith, as before, that the inhabitants of the said parish of L. in the said county of Lancaster, the said parts of the said common king's highway so being in decay as aforesaid, ought to repair and amend when and as occasion may require, and that within the said parish there is not now, nor from time whereof the memory of man is not to the contrary, hath there been such ancient and laudable custom there during all the time aforesaid used and approved of, with respect to the repairing of all and every the king's common highways within the said parish, that would, but for the said supposed custom, be repairable by the inhabitants of the said parish of L. at large, as by the said A. B. and C. D. is above in pleading alleged; and this the said attorney-general, who prosecutes as aforesaid for our said lord the king, prays may be inquired of by the country, &c.

ARTICLES OF THE PEACE.

In the King's Bench
of term in the
George the 2d.

year of the reign of King

A. B. of ——— humbly prayeth sureties of the peace against C. D. of ——— for the following causes.

First this exhibitant upon his oath saith that (here state the circumstances of personal violence or attempts at personal violence, threats, &c. on which the application is founded) (z).

And this exhibitant upon his oath further saith, that (where violence has been offered on several distinct occasions they should be so stated.)

And this exhibitant upon his oath further saith, that by means of the premises aforesaid, he apprehends that the said C. D. if not restrained, will (a) do some great bodily harm to him, the said A. B. and that he the said A. B. is now under great fear and apprehension thereof.

And lastly this exhibitant upon his oath further saith, that he doth not make this complaint and application out of hatred, malice, and ill will towards the said C. D. but for the preservation of his life and of his person from great bodily harm.

The above named A. B. was sworn to the truth of the premises on ——— next after ——— in the ——— year of the reign of king George the 2d. }
by the Court.

The same at the Quarter Sessions.

Lancashire to wit, at the general (or adjourned general) Quarter Session of the peace holden at ——— in and for the county of Lancaster, to wit, on ——— A. B. of ——— cometh in his own person and prayeth (proceed as in the last precedent.)

(z) Surety of the peace ought to be granted where a person has just cause of fear that another will be in his house, &c. do him some corporeal hurt, or procure another to do him some corporeal hurt, Bac. Ab. *Surety*. D.; or in his person *ib.*; or do some corporeal hurt to his wife or child, Dalton, c. 116. but not where the violence is intended to cattle, or servants, *ib.*—The court will not grant the application unless a reasonable foundation for apprehending danger appear on the face of the articles, 13 East. 172.

(a) The application is founded upon the reasonable apprehension of future danger, and it ought to be made promptly, for it cannot be presumed that the party labours under real apprehension where he suffers a long interval to elapse before he makes the application. Bac. Ab. tit. *surety*, D. ——— Affidavits cannot be read in answer to the application, *R. v. Doherty*, 13 East. 171. Lord Vane's case cited, *ib.* The term for which sureties are to be given is discretionary. *R. v. Bowes*. 1. T. R. 196.

APPENDIX.

P. 19. The st. 57 G. 3. c. 53. enacts, that from and after the passing of this act, all murders and manslaughters committed, or that shall be committed on land, at the said settlement in the Bay of *Honduras*, by any person or persons residing or being within the said settlement, and all murders and manslaughters committed or that shall be committed in the said islands of *New Zealand* and *Otaheite*, or within any other islands, countries, or places not within his majesty's dominions, nor subject to any *European* state or power, nor within the territory of the United States of *America*, by the master or crew of any *British* ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in, or belonged to, and have quitted any *British* ship or vessel to live in any of the said islands, countries, or places, or either of them, or that shall be there living, shall and may be tried, adjudged, and punished in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under or by virtue of the king's commission or commissions, which shall have been or which shall hereafter be issued under and by virtue and in pursuance of the powers and authorities of an act passed in the 46th year of his present majesty, intituled, *An Act for the more speedy trial of offences committed in distant parts upon the sea*, in the same manner as if such offence or offences had been committed on the high seas.

P. 33. A joint indictment lies against two for the personating of a seaman. *R. v. Pott and Kent*, Lent Assizes, 1818. Cor. Wood, B. and afterwards by the judges ; so for a rape.

P. 47. *R. v. Leeman*, York Summer Assizes, 1821, the jury threw out a bill of indictment for manslaughter, and Holroyd, J. quashed the coroner's inquisition, charging the prisoner with manslaughter, because the addition was after the *alias dictus*, and he held that inquisitions were within the statute of additions, see Cro. Jac. 341, 1 & 2 Phill. and Mary, c. 13, which speaks of an indictment by inquisition.

P. 50. *An addition after the alias dictus is insufficient, &c.* The objection appearing on the face of the indictment may be taken by motion without plea, *R. v. Ward*, York Sp. Ass. 1820, cor. Parke, J. with the concurrence of Bayley, J. and see the last preceding note.

P. 64. In a declaration for a nuisance if no place be mentioned the county in the margin will be intended. *Warren v. Webble*, 1 Taunt. 379 ; otherwise in an indictment, 1 Buls. 205.

P. 101. *An accurate copy.* Although the indictment itself contains mistakes. *Clinch's case*, East's P. C. 938, 952.

P. 105. In *Lowell's case*, East's P. C. 990. Leach. 282, the indictment alleged is purporting to be directed to Messrs. Drummond and Co., Charing Cross, by the name of Mr. Drummond, and the indictment was held to be good, but it does not appear that the objection was taken.

P. 163. *R. v. Silcot*, 3 Mod. 280, where a conviction for keeping a gun without a qualification (against the st. 33 H. 8. c. 6.) was quashed, because it merely alleged "non habuisset 100*l.* per ann.," without saying when.

P. 167. An indictment against an inn-keeper for not receiving a sick person, must allege that he was a traveller. 12 Mod. 1055.

P. 181, note (p). For the reference *R. v. Dobbs*, East's P. C. 513, read *R. v. Knight and Hoffer*, East's P. C. 510, and add, that an averment of a burglarious breaking with intent to steal a gelding is not proved by evidence of a breaking, &c. with intent to maim a gelding. *R. v. Dobbs*, East's P. C. 513.

P. 197. A certain quantity, to wit, 15 bushels of, &c. held to be sufficiently certain. *R. v. Arnold*, 5 T. R. 353.

P. 201. The st. 1 G. 4. c. 102, after reciting that by the st. 56 G. 3. c. 73, it is enacted, that it shall and may be lawful, and shall be deemed sufficient to all intents and purposes whatsoever, for the conviction of any offender or offenders charged in any indictment with grand or petty larceny, for or on account of stealing any minerals, or any timber, iron, or other materials used in or for the working of mines, being the personal property of any company or adventurers carrying on the same, to allege and aver that the minerals, timber, iron, or other materials so stolen, are the property of some one or more of the partners or adventurers in such mining concern, and others his or their partners or adventurers, without naming such other partners or adventurers. And whereas the said enactment has been found to facilitate the conviction of offenders, and to promote the due administration of justice, without depriving persons accused of any fair means of defence. Be it therefore enacted by the king's most excellent majesty, by and with the consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, the provisions of the said act, with respect to offenders charged as in the said act is mentioned, shall be deemed and taken to extend to all cases of offenders charged in any indictment with burglary, felony, grand or petty larceny, or criminal breach of trust, committed on the goods, chattels, or personal property, of what nature soever, of any partners whatsoever, in as ample a manner as if they had been particularly specified in the said act.

P. 205. See Litt. sec. 321. If there be two tenants in common of a personal chattel, and one dies, the executors shall hold and occupy with the survivor, as their testator did before he died, and see *For v. Hanbury*, Cowp. 445. 2 Comm. 399. 1 Vern. 217.

P. 210. An indictment in the reign of George the Fourth alleged the offence to have been committed in the reign of George the Third, but concluded against the peace of our said lord the king. The objection being taken at sessions, the justices took the opinion of a very eminent counsel on the validity of the indictment, and conformably with his opinion, held it to be sufficient.

P. 217. Semble the misspelling of a name in setting out a record is fatal, although it be idem sonans. See *Brown v. Jacob*, 2 Esp. C. 726, cor. Lord Kenyon. The court will not take notice of misrecitals of private acts of parliament, unless nul tiel record be pleaded, except as to the commencement, prorogation, &c. 1 Lev. 206. Doug. 97. 1 Ld. Ray. 318. 1 Salk. 330.

P. 229, note (7). But qu. whether judgment might not be given as for a larceny at common law, although the indictment was not framed upon the statute.

P. 230. An indictment against a constable for neglecting a duty prescribed by a statute need not conclude contra formam. *R. v. Wyatt*, Salk. 380.

P. 231. An indictment charging the stealing money, goods, or bank-notes, may conclude generally against the statute, see Clarke's case, East's P. C. 600. In an indictment for stealing bank-notes from the person, it is sufficient to conclude against the statute in the singular, per Le Blanc, J. York. Sp. Ass. 1815.

P. 248. One indicted as a sorter and charger of letters may be convicted as a sorter only. Shaw's case, East's P. C. 580.

P. 255. A variance from the thing alleged to have been stolen, forged, &c. is usually fatal, as lion rampant for lion passant, see Lee's case, Leach. 464, supra 193. So as to names of persons, as Edward for Edmund, case cor. Chambre, at Lancaster.

P. 311. See the course of proceeding, where the prisoner after a plea of not guilty withdrew his plea, and was allowed to plead to the jurisdiction. Kinlock's case, Fost. 15.

P. 313. Upon a plea of peerage under letters patent, they must be produced under the great seal. *R. v. Grahme*, 4 St. Tr. 410.

P. 343. If a defendant be charged conjunctively, where he might have been charged disjunctively, he may be convicted disjunctively. Willoughby's case, East's P. C. 581.

P. 344. A person charged with an offence against one statute may be found guilty of a more general offence against another statute, East's P. C. 1021, see p. 230.

P. 341. *Default of a juror.* The rule is now otherwise. See Leach. 618, 706. Fost. 76.

P. 354. In the case of burglary the jury must find that the loco in quo was parcel of the mansion house, or that they were inclosed within the same fence, &c. Garland's case, East's P. C. 493, where the verdict found that money had been taken up by the prisoner, which had been struck out of the hand of the prosecutor, the court would not intend that it was taken up by the prisoner in the presence of the prosecutor. *R. v. Francis*, 2 Str. 1815. Com. Rep. 478.

P. 357. In a special verdict against a principal 'in the second degree, the jury must either find that he was present, *aiding and abetting* in terms, or that he did such acts as shew he was present, and constitute him an aider and abettor in point of law. *R. v. Messenger, Appletree, and others*, Kel. 77. 2 St. Tr. 591. *R. v. Borthwick*, Doug. 201. In the case of Royce, who was indicted under the stat. 1 G. 1. st. 2. c. 6. for feloniously beginning to demolish a dwelling-house, the jury found, "that the said John Royce was then and there present, and did then and there encourage and abet the said persons unknown, in beginning to demolish and pull down the said dwelling-house, by then and there shouting and using expressions to excite the said persons so to do, but that the said John Royce did not with force begin to demolish, or pull, or do any act with his own hands or person, otherwise than as aforesaid," and the court, after the matter had been argued twice, held that the verdict was sufficient, Burr. 2073.

P. 359, note (b) i. e. in favour of the defendant, but the court will not grant a new trial after an acquittal, 4 Bl. Com. 361. 2 Haw. 442. *R. v. Cohen and Jacob*, 1 Starkie's C. 516. But in the case of an indictment for not repairing a highway, the court will, after an acquittal, stay the judgment, in order that the case may go to trial a second time on the merits. *R. v. Wandsworth*, 1 B. & A. 63.

P. 365. In the case of *R. v. Hargrove and others*, York Sum. Ass. 1821. Holroyd, J. sentenced the defendants, who had been jointly convicted of a libel, to pay a joint fine.

P. 449. The prosecutor is entitled to the possession of goods, although they have been sold in market overt, but only as against him who is in possession at the time of the conviction. *Horwood v. Smith*, 2 T. R. 720, East's P. C. 788. The st. 21 H. 8. c. 11. does not extend to goods obtained by fraud but not stolen. *Parker v. Patrick*, 5 T. R. 175. *R. v. Devereux and others*, 2 Leach, 665. East. P. C. 789. At common law the owner was entitled to retake his property, unless it had been changed by waiver, seizure by the king, or sale in market overt, East's P. C. 789.

P. 450. As to the punishment see the st. 18 Eliz, c. 7. 5 Ann. c. 6. s. 2. 4 G. 1. c. 11. 19 G. 3. c. 74. 53 G. 3. c. 162.

P. 453. See the st. 52 G. 3. c. 63. which makes it felony in brokers, bankers, &c. to embezzle securities deposited with them for safe custody, &c.

P. 473. By the st. 54 G. 3. c. 101. if any person shall maliciously, either by force or fraud, lead, take, or carry away, or decoy, or entice away, any child under the age of ten years, with intent to deprive its parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, by concealing or detaining such child from such parent or parents, or other person or persons having the lawful care or charge of it, or with intent to steal any article of apparel or ornament, or other thing of value or use upon or about the person of such child, to whomsoever such article may belong, or shall receive and harbour with any such intent as aforesaid any such child, knowing the same to have been so, by force or fraud, led, taken, or carried, or decoyed, or enticed away as aforesaid, every such person or persons, and his, her, and their counsellors, procurers, aiders, and abettors, shall be deemed guilty of felony, and shall be subject and liable to all such pains, penalties, punishments, and forfeitures as by the laws now in force may be inflicted upon or incurred by persons convicted of grand larceny.

P. 473. St. 48 G. 3. c. 129. s. 2. but without such force or putting in fear, &c. It is unnecessary to notice the exception in the indictment. *R. v. Young*, Lancaster Summer Assizes, 1814, where the indictment was similar in form to the above precedent. Where bank-notes are stolen from the person, it has been held to be sufficient to conclude, against the form of the statute, in the singular, per Le Blanc, J.

P. 485. By the st. 5 Ann. c. 31. s. 5. the receiving money is not either within this statute or 3 W. & M. c. 4. s. 9. *R. v. Guy*, Leach, 276, 3d ed.; neither are bank-notes within the stat. *R. v. Morris*, ib. 525. or bills of exchange, *R. v. Wilson*, cor. Best, J. York Spring Assizes, 1821.

P. 486. 10 G. 3. c. 48. Qu. whether a gold watch be plate within the stat. *R. v. Moses*, East's P. C. 754.

P. 486. St. 29 G. 2. c. 30. s. 1. any lead, iron, copper, &c. The statute extends to manufactures of iron, East's P. C. 752, although in Scott's case (ib.) it was held otherwise. And from the st. 21 G. 3. c. 69. it appears that the legislature considered manufactured vessels to be included under the general denomination of the materials of which they are made, see East's P. C. 752.

P. 644. Prec. 226. See Com. Dig. tit. Rescous, A. & D. 3.

P. 642. Rescue, by the st. 1 & 2 G. 4. c. 88. If any person shall

rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned or kept to hard labour in the common goal, house of correction, or penitentiary house, for any term not less than one and not exceeding three years.

2. And that if any person shall assault, beat, or wound any constable, officer, headborough or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent the lawful apprehension or detainer of any person charged with or suspected of felony; or if any person charged with or suspected of felony shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent his or her apprehension or detainer; then and in every or any such case, if the person or persons so offending shall be convicted of a misdemeanor only, it shall be lawful for the court before whom any such person or persons shall be so convicted as aforesaid, to order and direct, in case it shall think fit, that such person or persons shall, in addition to any other pains, penalties, or punishment to which he, she, or they are now subject or liable, be kept to hard labour for any term not exceeding two years, and not less than six months.

P. 645. See further, as to the transportation of felons, the st. 43. G. 3. c. 15. 56 G. 3. c. 27. 59 G. 3. c. 101. 1 & 2 G. 4. c. 6.

P. 682. by the st. 1 & 2 G. 4. c. 44. it was enacted as follows.

Whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by his Majesty's subjects, in various parts of the united empire, from the improper construction, as well as from the negligent use of furnaces employed in the working of engines by steam. And whereas by law every such nuisance, being of a public nature, is abateable as such by indictment; but the expense attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law. Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, that it shall and may be lawful for the court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such

costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing such judgment, as to the court may seem fit.

2. And be it further enacted, That if it shall appear to the court by which judgment ought to be pronounced in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful to the court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted.

INDEX.

ABATEMENT,

plea in, 311.

on what founded, *ib.*

1. on *defect apparent* on the record, *ib.*

opportunity allowed the defendant to take exceptions, *ib.*

what defects pleadable, 312.

what defect *must* be pleaded, *ib.*

in indictments for treason, *ib.*

little advantage to be derived from a plea of this nature, *ib.*

2. on *defect not apparent* on the record, *ib.*

misnomer, *ib.*

may be pleaded by attorney, *ib.*

ought to be tendered in writing, *ib.* and should be verified by affidavit.

misnomer of either christian or surname pleadable, 313.

but the defendant must disclose his real name, *ib.*

replication to such plea, *ib.*

in case of an appeal, *ib.*

omission of title of peer, *ib.*

how tried, *ib.*

in case of peerage by marriage, *ib.*

defendant pleading in abatement to an indictment for felony, should plead over to the felony, *ib.*

but in case of misdemeanor, &c. he is concluded by his plea in abatement, 313, 4.

practice as to the trial of a plea of this kind, 314.

foreign pleas, how tried at common law, *ib.*

under the stat. 22 H. 8. c. 14. 28 H. 8. c. 1. 32 H. 8. c. 3.

these do not extend to an indictment for treason, *ib.*

pendency of a first indictment not pleadable to a second, *ib.*

usual course in such case, *ib.*

Form of plea in abatement,

for want of an addition, 785.

that there is no such parish as that named, 786.

ACCESSORIES,

county; trial, 4, 7, 12, 13.

st. 33 H. 8. c. 23. does not extend to accessories, 13.

Accessory before the fact,

how charged in the indictment, 139, 140.

when indicted before the conviction of the principal, 140.

when indicted after the conviction, *ib.*

when a person in one county procures the commission of a felony in another, *ib.* and under the st. 43 G. 3. c. 113. s. 5. p. 8.

accessory to one of several principals how to be charged, 141, 142.

defendant indicted as accessory to two, may be convicted on evidence that he was accessory to one, *ib.*

how to be charged in case of murder, *ib.*

indictment against accessory for receipt of felon, must aver the felonious situation of the principal, 166.

and the guilty knowledge of the accessory, 167, 168.

in indictment against an accessory, the guilt of the principal must be averred, *ib.*

how averred when they are indicted together, 167, 8, 9.

when the accessory is indicted after the conviction of the principal, 168, 9.

when the offence is committed in another county, *ib.*

indictment against an accessory under 2 and 3 E. 6. c. 24. 398, 9.

need not conclude against the form of the stat., *ib.*

accessory may be arraigned, but not tried, before the appearance of the principal, 308.

formerly, where the attainder of the principal was prevented, the accessory could not be arraigned, *ib.*

in what cases the accessory may be proceeded against as upon an attainder of the principal, under stat. 1 Ann. sess. 2. c. 9. s. 1. *ib.*

indictments against, 481, 2.

accessory may enter into full defence of his principal, 309.

accessories before the fact, to a murder, ousted of clergy by stat. 4 & 5 P. & M. c. 4. 399.

ACQUITTAL, see tit. *Auterfoits acquit.***ADDITION:**

at common law, 45, 46, 47.

statute of *additions*, 1 H. 5. c. 5. enactments of, 47, 48.

estate or degree, construction of the words, 48, 49.

degree, *ib.*

dignity, 48, 49, 50.

office, 48, 49.

what are sufficient additions, 48, 49, 50.

name and addition of a female, 49.

form of the description, 49, 50.
 with an *alias dictus*, 50, 51.
 when addition ought to be repeated, 50.
 when further description is necessary, *ib.*
 defect as to the addition of one will not vitiate the indictment as to the rest, *ib.*
mystery, addition of, 50, 51.
 town, hamlet, or place, 51, 52.
 plea that there is no such town, *ib.*
 form of description, *ib.*
 sufficient to describe the defendant of such a *place*, 52.
 addition of *county*, *ib.*
 wife's addition, 53.
 defective addition, how to be taken advantage of, *ib.*
 when plea will operate as an estoppel, *ib.*
 plea, in abatement, for want of. See *Abatement, Misnomer.*

AIDERS AND ABETTORS,

how charged, 81, 82.
 when immaterial whether defendant be charged as a principal in the first degree or as an aider and abettor, 81, 2, 3.
 when ousted of clergy, 82, 83, 84, 85.
 clergy, when aider and abettor ousted of, without express words, 85, 86.
 how aider and abettor should be described, 86, 87, 88.
 whether the legislature in framing the stabbing act contemplated aiders and abettors, 85 n.
 abetment, how specially described, 87, 88.
 aider and abettor may be found guilty though the principal is acquitted, 82, 83.

ADMIRALTY SESSIONS,

holding of, 480, 481.
 stat. 32 G. 2. c. 25. s. 20.

AMENDMENTS,

statutes of amendment do not extend to criminal cases, 259.
 but see 267, 8.
 indictments cannot in general be amended because found on oath, 259.
 but in some instances have been amended, *ib.*
 even after verdict, *ib.*
 former practice where indictment wanted amendment, 260.
 present practice, *ib.*
 of coroner's inquisition, *ib.*
 of formal misprisions in joining issue, &c. *ib.*
 of a venire, 261.
 of nisi prius roll, *ib.*
 discontinuance not amendable, 261, 2.
 judgment amendable during the term, &c. *ib.*

Caption of indictment,

amendable after the term in which brought in, 263, 4, 5.

Atkinson's case, 263, 4, 5.
 of coroner's inquisition, 266.
 criminal information, 267.
 amendable at any time before trial, *ib.*
 and after judgment, as to mere clerical misprision, amendable at common law, *ib.*
 and *semble*, by virtue of the stat. 8 H. 6. c. 12. *ib.*
 operation of the stat. 8 H. 6. c. 12. *ib.*
 amendment of pleas, &c. 270, 271.
 amendable even in case of felony, *ib.*
verdict, whether amendable, *ib.*
judgment, not amendable after it has been matter of record, *ib.*
 Walcott's case, *ib.*

ANIMALS,

description of, in an indictment, 194, 5.
 animals *feræ naturæ*, *ib.*
 heifer, indictment for stealing, under st. 193.
 greyhound, description of, in indictment, *ib.*
 fish, description of, 194, 5.

APPEAL,

See *Indictment*.

APPRENTICE,

indictment for not receiving must shew a binding within the stat. 43 Eliz. 162, 3.
 indictment against for a fraudulent enlistment, 499, 500.
 stat. 53 G. 3. c. 17. s. 90. *ib.*
 indentures, how to be proved, 500, n.

ARRAIGNMENT,

what, 305.
 when defendant is put to plead immediately, *ib.*
 when entitled to an imparlance, *ib.*
 must be committed or find bail, *ib.*
 in the case of mayhem may plead in the office, 305, 6.
 whether defendant to be arraigned in irons, 306, 7.
 required to hold up his hand, 307.
 this not essential, *ib.*
 entry of the arraignment on the record, *ib.*
 may be arraigned on two indictments at the same time, 307, 8.
 the arraignment was in English whilst the indictment was in Latin, 307.

Arraignment of an accessory,

accessory might be proceeded against at common law after the attainder of the principal, 308.
 of one who is accessory to several, 308, 9.
 may be arraigned and tried though one only has appeared, 309.

and if acquitted may afterwards be tried as accessory to the rest, 309.

principal and accessory may be arraigned and tried together, ib.

but jury charged to acquit the accessory in case they find the principal not guilty, ib.

See title *Accessory*.

ARTIFICER,

enticing of, to leave the kingdom, 651.

stat. 23 G. 2. c. 13. ib.

ARSON,

nature of the offence, 439.

exclusion from clergy, ib.

statutes relating to, ib.

with intent to defraud, insurers, &c. ib.

description of the building, 439, 440.

ownership, allegation of, 440, 1.

where the occupation is merely permissive, 440, 1, 2.

in case of a reversioner, 440.

when the defendant sets fire to his own house, 441, 2.

words essential to the indictment, ib.

indictment for, 439.

offence against the possession, 440, 1.

person setting fire to his own dwelling-house indictable, 439, 441, 2.

guilty of arson if he thereby destroy his neighbour's, 441, 2.

how he should be charged in the indictment, ib.

whether the indictment must charge malice, ib.

See *Burning*.

ATTEMPTS,

to poison, 663, 4.

to burn defendant's house, 664.

See tit. *Endeavours and Solicitations*.

indictments for, 651. See *Index of Precedents*, same title.

AUTERFOITS ACQUIT,

ground of the plea, 316.

exception, ib.

the plea must shew, 317.

1. the manner and circumstances of the acquittal, ib.

2. the identity of the offence.

3. the identity of the party.

1. the manner and circumstances of the acquittal.

distinction between criminal and civil cases, as to pleading matter of record, 317.

nul tiel record, no plea, ib.

reason of this, ib.

time allowed to produce the record, 318.

- when prisoner is arraigned in K. B., *ib.*
- in other cases, *ib.*
- must be removed by writ, *ib.*
- must be recited in the plea, *ib.*
- must shew a legitimate acquittal by judgment, 319.
- acquittal in fact pleadable, though founded on mistake in law, 319, 320.
- an erroneous judgment pleadable, 320.
- where the indictment is sufficient, *ib.*
- doubt which arises where the indictment is itself insufficient, *ib.*
- doctrine held in Vaux's case, *ib.*
- comment on their doctrine, 320, 1.
- acquittal pleadable though the process be insufficient, 321.
- 2. *the identity of the offence*, 322.
 - 1. in point of law, *ib.*
 - one indicted as principal cannot plead his acquittal as accessory, *ib.*
 - in what cases an acquittal on a charge of one offence includes an acquittal of another, 322, 3.
 - of murder pleadable to a charge of manslaughter, 323.
 - of manslaughter to a charge of murder, 324.
 - acquittal of burglary laid with a larciny, no plea to a charge of burglary laid with intent only, *ib.*
 - of trespass, no bar to a charge of felony, 323.
 - but an acquittal of petit treason, bars an indictment for murder, 324.
 - qu. as to the converse, 325, 326, note (f).
 - acquittal as principal no bar to an indictment charging him as accessory, 325, 326.
 - qu. as to the converse, *ib.*
 - 2. of the same offence in fact, *ib.*
 - what variances between the 1st and 2nd indictment may be reconciled by averment, *ib.*
 - in point of time, 326.
 - persons, *ib.*
 - name, how averred, *ib.*
 - place, *ib.*
 - goods taken by robbery in one county carried into another, *ib.*
 - whether acquittal of larciny in one county is pleadable in another, 327.
 - acquittal of burglary when pleadable to an indictment for larciny, *ib.*
 - of homicide in one county, whether pleadable to an indictment in another, 328.
 - variance, when substantial, cannot be reconciled by averment, *ib.*

3. *identity of persons*, 328.

where the addition is different, 329.

inquest upon such averment, *ib.*

where the guilt is derivative, the acquittal of the principal charge is pleadable, 334.

where defendant breaks gaol he may plead an acquittal of the felony to an indictment for the breaking gaol, *ib.*

auterfois acquit, plea of, *pr.* 333, *p.* 787.

AUTERFOITS ATTAINT, *plea of*,

ground of, 331.

good, though the indictment insufficient, *ib.*

when not allowable, 331, 2.

never allowable when a second trial would answer any useful purpose, 332.

is not valid after a removal of the attainder, *ib.*

nor after a pardon of the first, *ib.*

reversed attainder not pleadable, 333.

requisites of this plea, *ib.*

AUTERFOITS CONVICT, *plea of*,

conviction no bar unless the defendant receive judgment or pray his clergy, *ib.*

otherwise if he pray his clergy, though not admitted to it, 330.

conviction followed by admission to clergy, how far available, *ib.*

enactment of stats. 25 E. 3. c. 5. 8 Eliz. c. 4. and 18 Eliz. c. 7. s. 2, 330, 1.

of 3 H. 7. c. 1. which takes away the plea of *auterfois acquit* on an appeal of death, 331.

does not extend to the case where the defendant is convicted of manslaughter, *ib.*

B.

BAIL,

personation of, 529, 530.

BANK NOTE,

making and publishing papers resembling them, 52 G. 3. c. 138, 564.

see *Forgery—Larceny—Chose in Action—Moveables.*

BANKRUPT,

fraudulent concealment of effects by, 568, 9.

BARON,

of the Exchequer, how described, 541, 2.

BASTARD CHILD,

murder of, 43 G. 3. c. 58. repeals the stat. 21 J. 1. c. 27, 405.

indictment for murder of, *ib.*

mother concealing the birth may be imprisoned for two years, *ib.*

BENEFIT,

of the stat. prayer of, 794. See *Clergy*.

BILL OF EXCHANGE,

See *tit. Chose in Action, Forgery*.

BLACK ACT,

9 G. 1. c. 22. offences under, triable in any county, 13, 14. at the option of the prosecutor, *ib.*

assault upon officers of the excise and customs, *ib.*

indictment under, form of, 225, 6.

mode prescribed by, to compel offenders to appear, 576.

malice must be personal against the owner of the property, *ib.*

indictments upon, *ib.*

See *Index to the Precedents, tit. Black Act*.

BLASPHEMY,

indictment for, 123, 4.

BLEACHING CROFT,

stealing from, 474, 5.

stat. 51 G. 3. c. 41, *ib.*

BRASS,

stealing of, 477, 8.

BREAD, see Provisions.**BREAKING,**

into houses, &c. with intent to destroy goods, 587, 8, 9.

different statutes relating to, *ib.*

BRIDGES,

indictment for not repairing, 701.

See *tit. Highways*.

BROKERAGE,

illegal, indictment for, 201.

excess of sum taken beyond the legal amount not material, *ib.*

BURGLARY,

technical words, descriptive of, 78.

stat. ousting of clergy, 436.

accessories before the fact, *ib.*

after the fact, *ib.*

indictment for, *ib.*

house, how described, 437.

situation of, *ib.*

may be committed in a church or chapel, *ib.*
 intention, how to be laid, *ib.*
 ownership of the goods should be accurately averred, *ib.*
 breaking out of an house, *st. 12 Ann. c. 7. 438.*
 indictment for, *ib.*

BURNING,

of dwelling house, 439. See *Arson.*
 of cotton mill, 442, 3.
 of dwelling house, with intent to defraud the insurers, *ib.*
 of dock-yard, 443, 4.
 indictment for, *ib.*
 stack of hay, *ib.*
 place of confinement, 444, 5,

C.

CAPIAS,

issuable by justices of the peace, 273.
 by a coroner, 274.
 by justices of the peace in sessions, *ib.*
 interval between teste and return of, *ib.*
 when awarded into the county where the court sits, *ib.*
 into another county, *ib.*
 to whom directed, *ib.*
 when the defendant dwells in another county, by *stat.*
 5 E. 3. c. 11, *ib.*
 whether justices of the peace are within this statute, *ib.*
 seeme they are, *ib.*, 275.
 may be awarded by justices in eyre, or by the Court of
 K. B. into any county, *ib.*
 against whom, *ib.*
 in what cases more than one capias is necessary, 279.
 See *tit. Process.*

CAPTION

of an indictment, what, 233.
 precedent of, given by Lord Hale, *ib.*
 must shew that the court had jurisdiction, 234.
 that the session, &c. was held for the county, *ib.*
 ought to notice the authority of the justices, *ib.*
 justices, how described, *ib.* 235.
 title of their authority should be set forth, *ib.*
 where the session is holden by virtue of several commis-
 sions, *ib.*
 need not shew how the court was constituted, *ib.*
 names of the justices, *ib.*
 allegation that they were of the quorum, 236, 7.

Description of the jurors, 235.

must shew a finding by twelve jurors, *ib.*

unnecessary to specify all their names, *ib.*

must be shewn that they were sworn and charged, *ib.*

need not be described as *probi et legales homines*, 237, 8.

The time of the caption, *ib.*

when taken at an adjourned session, *ib.*

uncertain or improper day will vitiate the indictment, *ib.*

The place of the caption, *ib.*

must be shewn to be within the county, &c. *ib.*

how shewn, *ib.*

county in the margin not necessarily a part of the caption,
237, 8.

but may be made so by reference, *ib.*

Conclusion of the caption, 238, 9.

form of, *ib.*

See *tit. Amendment*.

CATTLE,

construction of the word under the stat. 15 G. 2. c. 34.
465.

CERTAINTY,

as much required in an indictment as in trespass for goods,
192.

what certainty required in an indictment, 68, 9, 241.

CERTIFICATE,

of conviction,

CHALLENGE,

indictment for sending, 656, 7.

See *Index to the Precedents*, *tit. Libel*.

CHAPEL,

stealing from, 470, 472, 3.

statutes ousting of clergy, 473.

accessories not ousted, unless the offence amount to a bur-
glary, *ib.*

See *Sacrilege, Ownership*, and Appendix Note to p. 201, 2

CHATTELS, see *Moveables, Ownership*.**CHEATS,**

indictment for, when maintainable, 488.

indictments for, 488, &c.

See the *Index to Precedents*, *tit. Frauds, Cheats, &c.*

selling by false scales, 492.

CHOSE IN ACTION,

stealing of, 194, 5, 6, 467.

ought not to be described as a chattel, 195, 6, 7.

stat. 2 G. 2. c. 25. as to stealing of, 194, 5, 453, 4, 5, 6,
467.

CHURCH,

disturbance in, 676.
robbing of, see *Sacrilege*.

CLERGY,

offender, when ousted of clergy, though a clergyable offence
only, is charged in the indictment, 9, 10.
3 W. & M. c. 9. s. 3., 9, 10, 11.
to what cases the act extends, 10, 11.
offender ousted of, in foreign county, 8, 9.
ouster from, under stat. 3 & 4 W. & M. c. 1., 221, 2.
in such case no entry on the record necessary, 222, 3.
but the offence charged must be one in which the offender
stands in need of clergy, ib.
aider and abettor, when ousted, see *Aider and Abettor*.
See Index to Precedents, tit. *Counter-plea*.

CLERK,

indictment against, for embezzlement, 453.
stat. 39 G. 3. c. 85., ib.
this stat. declaratory of the common law, 453, 4.
observations on the usual form of indictment under this
statute, 455, 6.

CLERK OF THE PEACE,

extortion by, 616, 7.

COACH-HOUSE,

stealing in, 468, 9.

COIN,

guineas, buying of, 566.
indictments relating to the coin, 555, 6, &c. &c.
See Index to Precedents, tit. *Coin*.

COINING,

of copper money, 11 G. 3. c. 40. 555, 6.
of foreign copper money, 43 G. 3. c. 139. s. 3. ib.
putting off counterfeit silver money, 556, 7.
st. 8 and 9 W. 3. c. 26., ib.
construction of this act, 556, 7, 8.
counterfeiting the gold coin, 557, 8.
st. 15 G. 2. c. 28., 557, 8, 560, 1.
uttering such coin, ib.
having in possession, ib.
bank tokens, 563.
st. 52 G. 3. c. c. 563.
bringing counterfeit tokens into the kingdom, 565.

COLLATERAL CIRCUMSTANCES,

if essential to the offence, must be averred, 160, 1.
an act in itself innocent, may be criminal from the situa-
tion or knowledge of the defendant, 161.

in case of omission to perform a duty, obligation must in general be shewn, 161.

unless it be implied by law, *ib.*

indictment for refusing to take the oath as constable, must shew a legal election, *ib.*

indictment for refusing to take an apprentice, must shew a legal binding within the stat. 43 Eliz. 162, 3.

for contempt in not executing a warrant, must shew that it was a legal warrant, *ib.*

situation of the defendant, how averred, *ib.*

existens, &c. a sufficient allegation, 162, 3.

knowledge of the defendant, when to be averred, 164, 5, 6.

in an indictment for receipt of an attainted felon, *ib.*

knowledge, how averred, 166, 7.

situation of others, *ib.*

indictment for suffering a felon to *escape*, must shew the nature of the felony, and aver that it was committed, 166, 7, 8, 627.

for a *rescous* must shew that the party rescued was in legal custody, 167, 8, 642.

under the stat. 16 G. 2. c. 31. must shew a committal for treason or felony, *ib.*

against an accessory after the fact for receiving a felon, must shew the felonious situation of the principal, and the guilty knowledge of the receiver, 167, 8.

See tit. *Accessory*.

in an indictment for a misdemeanor in receiving stolen goods, unnecessary to name the principal offender, 168, 9.

or to allege the principal felony with time and place, *ib.*

receiver of traitor, how charged, 170.

where homicide amounts to murder, in respect of the situation or character of the person killed, the usual form of indictment is sufficient, 170, 1.

From other circumstances.

in general it is unnecessary to negative any excuse or justification which would be a defence upon the trial, 170, 1.

in indictment against receiver, for a misdemeanor, unnecessary to negative the conviction of the principal, 171, 2.

but the rule laid down by Serjeant Hawkins is too general, 171, 2, 3, 4, 5, 6.

negative matter, if contained in the purview of a prohibitory stat. must be set out, 172, 3, 4, 5, 6.

so in case of conviction, 174, 5.

so if the exception be contained in a clause to which the enacting clause immediately refers, 175, 6.

CONIES,

stealing of, 461.

stat. 5 G. 3. c. 14. s. 6., *ib.*

COMMON BARRETOR,

how charged, 78.

common scold, &c. *ib.*

CONSPIRACIES AND ILLEGAL COMBINATIONS,

usual form of charging the offence, 154, 5. . .

where the object is apparently criminal, the means by which it is to be effected need not be set out, 156, 7.

proper to set out overt acts, *ib.*

unnecessary to allege that the *charge* made by the conspirators was *false*, *ib.*

where the object is not criminal, an intention to effect it by improper means should be shewn, 155, 6, 7, 8.

conspiracy to marry paupers, 156, 7.

question chiefly considered in case of indictments for the last offence, *ib.*

under the stat. 39 and 40 G. 3. c. 106. against illegal agreements by journeymen manufacturers, the agreement must be stated, 157, 8.

indictment for administration of unlawful oath, under 37 G. 3. c. 123. 158.

See *Index to Precedents*, same title.

what must be set forth, 157, 8.

CONSTABLE,

indictment for not taking the oath to serve office, must shew a legal election, 161, 2.

and notice of such election, *ib.*

election of, 619, 620.

refusal to take office, 619, 620, 2, 5.

refusal to watch with constable, 602.

See *tit. Office*.

CONTEMPT, see *Refusal, Constable*.**CONTRA FORMAM, &c.**

when necessary, 228, &c.

where the offence is entirely created by a stat., *ib.*

where a common law offence is made an offence of an higher nature, 229, 230.

where offence at common law is deprived of some benefit by a statute, *ib.*

where an additional punishment is inflicted by a stat., *ib.*

where the stat. is *declaratory*, *ib.*

the conclusion may be rejected as surplusage, *ib.*

where several statutes relate to the same offence, *ib.*

where an offence is prohibited by each of two statutes, 230, 1.

by virtue of two statutes taken together, and not by virtue of either singly, 231.

temporary act made perpetual by a second, *ib.*

expired stat. revived by another, *ib.*

one stat. creates the offence, another adds the penalty, 231.

one stat. is explained by another, 231, 2.

one stat. is continued by another, 231.

statutes used for statute, 232.

CONVICTIONS,

insufficient to pursue the words of the stat. 213.

See tit. *Indictment*.

COPPER,

stealing of, 477, 8.

CORONER,

extortion by, 613, 4.

statutes relating to, ib.

refusal to take an inquisition, 618.

See tit. *Extortion, Offices*.

COTTON GOODS,

stealing of, 474, 5.

COTTON MILL,

burning of, 442, 3.

indictment for, ib.

See tit. *Arson, Burning*.

COUNT,

joinder of different counts, see tit. *Joinder*.

commencement of a count subsequent to the first, 376.

COUNTERFEIT

coin, see *Coin, Forgery*.

COUNTERPLEA,

to prayer of clergy,

See *Index of Precedents*, tit. *Counterplea*.

COUNTY,

locality of crimes at common law, 1.

statutable exceptions, 6.

venue, where to be laid in particular cases at common law,
20 to 28.

jurisdiction, notice of, when it depends on particular cir-
cumstances, 28.

jurors, power of, to inquire, local and limited, p. 1, 2, 3.

if they inquire beyond their jurisdiction, indictment void, 1.

rule of common law, as to, ib.

consequence of this limitation, offenders frequently escape
with impunity for want of power to inquire, 2.

offence committed partly in each of two counties, ib.

stealing records, ib.

heirress, abduction of, ib.

goods carried into a second county, 2, 3, 6.

accessories in one county to felony in another, 4.

stroke in one county and death in another, 4, 6.

whether inquirable of at common law, 4.
 remedy by stat. 2 & 3 E. 6. c. 24, 5.
 goods stolen in one county received in another, 6.
 murder, stroke in one county death in another, *ib.*
 proceedings in such case, *ib.*
 appeal, 7.
 receiver in one county of goods stolen in another, 6.
 possession in one county of goods stolen in another, 10.
 accessories in one county to felony in another, where to be
 inquired of, 7. 10.
 certificate of conviction of the principal, 7, 8.
 form of the indictment, 8. 481.
 murder, form of indictment against accessory in one county
 for a murder in another, 8, 398, 9.
 offence partly committed beyond the realm, 8.
 indictment under stat. 2 G. 2. c. 21. 8, 9.
 person on shore kills another at sea, 9.
 foreign county, robbery in, when it may be inquired into
 under the stat. 3 W. & M. c. 9. s. 3. 9, 10, 11.

See *Venus*.

goods stolen in one part of the united kingdom carried into
 another, 10. See Appendix Note to p. 10, 11.
 offender triable in either, *ib.*
 13 G. 3. c. 31. s. 34. and 44 G. 3. c. 72. provisions of, *ib.*
 in what county indictment may be laid, by virtue of several
 statutes, 11, 12.
 where offender *apprehended*, *ib.*
 stat. 1. J. 1. c. 1. construction of, *ib.*
 offender may still be tried where the offence is committed, *ib.*

In adjacent county, *ib.*

26 G. 2. c. 19. against plundering ships, 11, 12, 13.
 destroying turnpikes, 12, 13.
 works on navigable rivers, *ib.*

In any county, *ib.*

treason and murder, *ib.*
 33 H. 8. c. 23. *ib.*
 repealed, as to treason, by 1 & 2 P. & M. c. 10. s. 8. 12, 13.
 county in *margent* no part of the record, 237, 239.
 when it will aid an omission in the body of an indictment,
 237, 8, 9. 64, 5.

See *Appendix Note* to p. 64, 5.

COUNTY PALATINE,

writ issuing within, how tested, 273.

COURT

of justice, assault in, 670, 1.

COVENTRY ACT,

enactments of, 425.
 indictment under, *ib.*

D.

DEED,

larciny of, 195.
forgery of, see tit. *Forgery*.

DEER,

stealing of, 463.
stat. 9 G. 1. c. 22. s. 1. ib.
stat. 16 G. 3. c. 30. and 42 G. 3. c. 107. ib.

DEFECTS in Indictments,

in language, 242:
indirect, uncertain, and double allegations, 244, 5.
repugnancy, 247, 8.
doctrine of surplusage, 247, 8, 9, 250, &c.

DEFENDANT,

description of, Chap. III. 45.

DEMAND,

of money under the stat. 7 G. 2. c. 21. 426.

DEMURRER,

special demurrer for want of allegation of time and place,
pr. 331, 786.
demurrer to an indictment for the non-repair of an highway,
pr. 332, 5, ib.
joinder in demurrer, 810.
what it puts in issue, 315.
seldom resorted to in practice, ib.
whether conclusive in capital cases, ib.

DISJUNCTIVE,

allegation, when fatal, 245, 6.
when sufficient, ib.

DISORDERLY HOUSE,

indictment for keeping, 689, 690.
wife may be indicted with her husband, ib.

DISSENTERS'

meeting-house, disturbance in, 676, 677.

DWELLING-HOUSE,

stealing in, to the amount of 40s. 467, 8.
owner's name essential, ib.
stat. 12 Ann, st. 1. c. 7. s. 1. ib.
putting the owner in fear, 469.
stat. 3 & 4 W. & M. c. 9. s. 1. ib.
See *Arson*, *Burglary*.

E.

EFFIGY,

indictment for conspiracy and drawing in effigy collectors of taxes, &c. 658, 9.

ENDEAVOURS,

See *Attempts, Solicitations.*

ENGRAVING

of bankers' notes, &c. 512, 564.

ERROR, WRIT OF,

usual mode of bringing the writ, 371.

practice on writ of error when brought, 372.

effect of writ as to the proceedings in the inferior court, ib.

on what defects it may be grounded, ib.

errors must be assigned before the writ can be granted, ib.

if the party attainted had land, a *scire facias* to the tenants necessary, 373.

otherwise in case of treason,

and in case of felony, where it is suggested that the party had no lands, ib.

reversal of attainder against principal, operates as a reversal of the attainder of the accessory, ib.

stat. 33 H. 8. c. 29. does not extend to illegal attainders, ib.

ESCAPE,

indictment for suffering the escape of a felon must shew the nature of the felony, and that it was actually committed, 167, 169, 170.

See *Collateral Circumstances.*

indictments for, 627, &c. &c.

See *Index of Precedents*, tit. *Escape.*

guilt of officer who permits an escape, 627.

not material at what stage the escape is suffered, ib.

negligent escape, ib.

indictment for, what it must shew, 630, 1.

aiding prisoner in attempt to escape, 629, 630.

provisions by stat. 16 G. 2. c. 31. ib.

commitment on suspicion only will not warrant a conviction under the stat. 640.

an attempt need not be expressly alleged, 640, 1.

EXIGENT, WRIT OF,

nature of the writ, 282.

return of *outlawry*, 283.

name of the coroner, 284.

description of the county court, *ib.*

capias and *exigent*, how averred upon the record, 284, 5.

Effect of outlawry,

in case of treason or felony, 285.

amounts to a conviction, *ib.*

but the party outlawed still under the protection of the law, *ib.*

writ of *proclamation*, *ib.*

stat. 4 & 5 W. & M. c. 22. s. 4. *ib.*

and of 31 Eliz. c. 3. *ib.*

do not apply to outlawries subsequent to conviction, 286.

exigency of this writ, *ib.*

need not say county court, *ib.*

return of, 286, 7.

need not allege that the party did not render himself, 286.

must shew specially how the proclamations were made, 287.

statement of, upon the record, *ib.*

will be bad if defendant required to appear after outlawry, *ib.*

delivery of the writ to the sheriff, *ib.*

EXTORTION,

indictment for, 610, 611, &c.

See *Index of Precedents*, same title.

under colour of office, *ib.*

in what county offence to be laid, 611.

what allegations are necessary, 149 to 154.

See *Offica*.

F.

FALSE PRETENCES,

indictments for obtaining money by, need not expressly aver that the token or pretences were false, 96, 7, 8.

must set out the pretences, 95, 6.

See *Fraud, Fraudulent Means*.

indictment for obtaining money, &c. by, 494, 5.

stat. 30 G. 2. c. 24. s. 1. 496, 7.

construction of this stat. *ib.*

indictment must negative the truth of the pretences, 497, 8.

FALSE TOKENS,

obtaining money by means of, 95, 96, 494.

stat. 33 H. 8. c. 1. *ib.*

FALSE

weights and measures, see *Cheats*.

FEAR,

averment of, whether necessary, 78, 9.

FELONICE,

necessary in all indictments for felony, 76, 7.

FISH,

stealing of, 194, 5, 462.

stat. 5 G. 3. c. 14. s. 1. ib.

FISH POND,

injuries to, 476.

FORCIBLE ENTRY AND DETAINER,

indictment for, at common law, 444, 5.

into a freehold, indictment for, 445, 6.

indictment for must shew an entry, 445.

description of the premises, ib.

under the stat. 8 H. 6. c. 9. ib.

must shew that the place was the freehold of, &c. ib.

averment of actual seisin unnecessary, ib.

unnecessary to shew what particular estate the party had, ib.

effect of the word *disseise*, 446.

what averments are essential to entitle the party grieved to restitution, ib.

continuance of the disseisin must be alleged, ib.

statutes of forcible entry and detainer, 444, 5, 6, 7.

on tenant for years, 447.

FORCIBLE MEANS,

averment *vi et armis*, 90, 1.

injuries to the person, 91, 2.

homicide, 91, 2, 3, 4.

burglary, 93, 4.

robbery from the person, ib.

larciny, ib.

battery of the person, 94, 5.

forcible entry, ib.

See tit. *Forcible Entry*.

FOREIGN PLEAS,

trial of, at common law, 314.

under the stat. of H. 8. ib.

FORESTALLING,

indictment for, 679, 680.

nature of the offence, 680, 1.

FORGERY,

indictment for forgery must allege,

1. that the defendant did falsely make, &c. 98, 9, &c.

2. the particular instrument set forth, 100, 1.

3. with intent to defraud another, 111.

- an *alteration* amounts to a forgery of the whole, 99, 100.
- how the instrument should be set forth, 100, 1.
- by what words prefaced, *ib.*
- an accurate copy must be set out, *ib.*
- tenor* set out, what variance will be fatal, 101, 2.
- whether necessary to set out the whole of a forged writing, 102, 3, 4.
- how the forged instrument should be shewn to be of the kind prohibited, 104, 5, 7, 8, 9, 10.
- use of the term *purport*, 104, 5, 6.
- when fatal, 105, 6.
- proper use of the term, 106, 7, 8.
- particular description of the instrument afterwards set out objectionable, *ib.*
- how a particular instrument should be brought within the descriptive words of a statute, 107, 8.
- indictment for foreign deed must aver that it was sealed, 101.
- defect, in the instrument set out, when fatal, 108, 9.
- offence may be complete, though the instrument, if genuine, would not have been operative, 110, 11.
- as for want of stamp, 110, 11, 12.
- averment of *intent to defraud*, 111, 12, 180, 1.
- the particular means need not be shewn, 111, 12, 13.
- intent must be proved as laid, 111, 12, 180.
- indictments for forgery, 506 to 529.
- nature of the offence at common law*, 503.
- different definitions of it, *ib.*
- what amounts to a *false making*, *ib.*
- what resemblance to a genuine instrument is essential to the offence, 503, 4.
- of *what instrument*, *ib.*
- intention to defraud*, 504, 5.
- different statutes relating to, *ib.*
- forgery with intent to defeat an estate of freehold, &c. under 5 Eliz. c. 14. s. 2., 506.
- of Bank of England notes, 511. Stat. 15 G. 2. c. 13. s. 11. 13 G. 3. c. 79. 41 G. 3. c. 39. 45 G. 3. c. 89.
- allegations necessary in such indictments, 513, &c.
- of bills of exchange, promissory notes, &c. 514, 517, 8. Stat. 2 G. 2. c. 25. 9 G. 2. c. 18. 31 G. 2. c. 22. s. 78. 18 G. 3. c. 18. 45 G. 3. c. 89.
- putting away forged notes, &c. 515.
- having in possession forged Bank of England notes, knowing, &c. 517.
- stat. 41 G. 3. c. 39. *ib.*
- 45 G. 3. c. 89. s. 6. *ib.*
- forgery of receipt, &c. 498, 500, 520, 523, 525, 6.
- alteration of a genuine note, 502, 3, 520.
- forgery of a bond, 522.

of a will, 527, 8.
of a writ of *fiери fiacias*, 532.

FRAUD,

indictments for, 488, &c.
in what cases an indictment is maintainable for, *ib.*
where it tends to prejudice the public at large, *ib.*
in case of *false tokens*, 489.
forgery, *ib.*
conspiracy, *ib.*
See *tit. Cheats, False Pretences, Forgery.*

FRAUDULENT MEANS,

instrument of fraud should be specified, 94, 5.
reason for this, *ib.*
cheating at common law, *ib.*
obtaining money by false tokens, 94, 5, 6, 7, 8.
under false pretences, 95, 6.
in case of fraud, how far necessary to particularize, *ib.*
extortion, 96, 7, 8.
See *tit. Forgery, False Pretences, Cheats.*

G.

GAMING,

keeping of a gaming house, how described, 70.
fraudulent winning by dice, 500. Stat. 9 Ann. c. 14. s. 5.
what games are within the stat. 500, 1:
winning above £10. at one sitting, &c. 501. Stat. 18 G. 2.
c. 34. s. 8.
offence where to be laid, 502.
assault for money won at play, under the stat. 9 Ann. c. 14.
429, 430.
indictment maintainable, though the assault was committed
at another time. See *Appendix Note* to p. 429, 430.

GAOL,

breaking of, 629.
See *Index to Precedents, tit. Gaol.*
nature of the offence, 629, 630.
allegations necessary, *ib.*

GARDEN, see Trees, Shrubs.

GELDING,

stealing of, 462.
statutes ousting of clergy, *ib.*
maliciously killing of, 579.
malice must be personal against the owner, 579.

GOODS AND CHATTELS,

description when proper, 194, 5.

GREAT SEAL,

how described since the union, 569.

GUINEAS,

buying of, 566.

stat. relating to, *ib.*

See *Coin*.

H.**HIGH TREASON, see. *Treason*.****HIGHWAY,**

parties to be charged with non-repair of, 32.

obligation to repair need not be averred as against a parish, 161, 692, 3, 4, 5.

but in an indictment against a private individual, the obligation to repair must be shewn, 161, 692, 3.

indictment for, must set out the circumstances of the default, 154.

the extent of the evil complained of, by setting out the length and breadth of the road out of repair, *ib.*

indictment for not repairing, 692.

how it should describe the highway, 192, 692, 3.

need not be alleged from time whereof, &c. 692, 3.

what is an highway, *ib.*

variance from the description, *ib.*

extent of the nuisance, 693, 4.

where defendant is bound to repair but one half, *ib.*

obligation of parish, how laid, *ib.*

presentment of an highway, 694, 5.

obligation to repair, when it must be averred, *ib.*

how averred, *ib.*

against an individual, 695.

by reason of inclosure, 698.

against a subdivision of a parish, 696.

how such subdivision may be bound, *ib.*

See *tit. Nuisance*, and 687, 690, &c.

plea by an individual to an indictment for the non-repair of a highway, 808.

liability of the person who encloses the adjacent land, 799.

plea by the inhabitants of a township, 806.

confession as to part, and not guilty as to the residue, *ib.*

HIGHWAY ROBBERY,

in or near the highway held sufficient, 219, 220, 245, 6.

how described, 473, 4.

HOMICIDE,

See *Indictment, Foreible Means, Manslaughter, and Murder*

HORSE,

stealing of, see *Gelding, Black Act.*

HOUSE,

breaking of, persons therein being put in fear, ousted of clergy, by stat. 1 E. 6. c. 12. 436.

in the day-time, indictment for, 438, 9.

to destroy frames, &c. 586, 7.

See *Burglary.*

I.

INDICTMENT,

substantial requisites, 68, 9.

formal requisites of, 240.

certainty of, *ib.*

indictment, quality of, 240.

strictness in construction of indictment, *ib.*

a blemish in the law, *ib.*

relaxation from, in later times, 240, 1.

general requisites in every indictment, 241.

certainty in, *ib.*

language of indictment, 242.

under the stats. 4 G. 2. c. 26. . 6 G. 2. c. 14. *ib.*

slender exceptions formerly allowed, 243.

mis-spelling of a word of art, *ib.*

faulty and ungrammatical English, *ib.*

figures not allowable, 244, 5.

charge must be direct and positive, ib.

allegation prefaced by a *quod cum*, *ib.*

sufficient if matter be merely introductory, *ib.*

allegation by means of participle, 244, 5, 6.

of situation under an *existens*, 245, 6.

charge must be single, ib.

duplicity will vitiate, *ib.*

disjunctive allegation sometimes good, *ib.*

every distinct count must contain a complete charge, 246, 7.

if punishment for second offence be accumulative, both offences must be alleged in same count, *ib.*

cumulative allegations may be good as to part, though bad as to residue, *ib.*

where punishment for second offence is enhanced, charges must be cumulatively alleged, *ib.*

- without *inconsistency* or *repugnancy*, 247, 8.
 effect of inconsistent or repugnant allegation, *ib.*
 in what cases the defective allegation may be rejected as *surplusage*, *ib.*
substantial description of the offence, 68.
 reasons for requiring particularity, *ib.*
 1. to identify the charge, *ib.*
 2. to enable the defendant to plead *auterfoits acquit*, &c. *ib.*
 3. to warrant the court in granting or refusing a particular indulgence, 69.
 4. to enable the defendant to plead or demur, *ib.*
 5. to warrant the judgment, *ib.*
 general charge insufficient, *ib.*
 though formerly allowed in many instances, *ib.*
 in what cases a general charge is now allowable, 70.
 degree of particularity requisite in an indictment, *ib.*
 different authorities on this head, 71, 2.
 nature and degree of the offence how to be alleged, 73.
 division of crimes into three great classes, 74.
 how distinguished on the face of the indictment, *ib.*
 technical words descriptive of the different species of felony, &c. 75.
 necessity of adhering to such words, *ib.*
technical words in case of treason, *ib.*
 traitorously, *ib.*
 against the defendant's duty of *natural allegiance*, *ib.*
 in case of inferior treasons, 76, 7.
 technical words in case of *felony*, *ib.*
 homicide, *murder*, *malice aforethought*, *ib.*
 that the defendant *struck*, &c. 77, 8.
 that the wound or bruise was *mortal*, *ib.*
mayhem, *ib.*
 rape, *ib.*
 sodomy, *ib.*
 burglary, 78, 9.
means and manner of committing the offence, chap. 7.
 when to be set forth, 89, 90.
 why, 90, 1.
forcible means, 91.
vi et armis, whether necessary, *ib.*
 injury to the person, how described, 91.
homicide, *ib.*
 description of the weapon or poison, *ib.*
 how held, 92.
 kind of death, 91.
 nature of the injury, dimensions of the wound, &c. 92, 3.
 variance from this description, 91, 2, 3.
 allegation that the party died of the wound, &c. 93, 1.

fraudulent means, 94, 5.

See *Fraud, Forgery, Perjury*.

illegal attempts, &c.

See *Attempts*.

conspiracies.

See tit. *Conspiracies*.

misconduct in office.

See *Office, Extortion, &c.*

collateral circumstances, ch. 8, 160.

See tit. *Collateral Circumstances*.

averment of intention.

See *Intention*.

description of persons, places, and things, chap. 10, 182.

when indictment must shew special circumstances which give jurisdiction, 28, 9.

particular time, ib.

of place, ib.

that defendant is in custody, ib.

under special commission, 29, 30.

when framed on statute, 79, 80.

description of persons, 182, 3. See tit. *Persons*.

of places, 188. See tit. *Places*.

of things moveable, 192.

when framed on statute, 79, ch. 12. 212.

conclusion of, 208.

special conclusion, when necessary, ib.

in case of murder, ib.

perjury, ib.

nuisance, ib.

ad commune nocumentum, when necessary, ib.

against common scolds and barretors, 209.

against the peace, ib.

when necessary, ib.

when the offence is committed in different reigns, ib.

is continued into a second, 209, 210.

in contemptum regis, ib.

contra coronam et dignitatem, 210, 11.

proper to conclude separately to each count, ib.

but semble a general conclusion applies to all, ib.

ILLEGAL SOLICITATIONS, &c.

See *Libel, Attempts, Solicitations*.

INNUENDO,

for the doctrine of innuendos, see *Perjury, Libel*.

when objectionable, 537.

INTENTION OF THE DEFENDANT,

every crime includes a vicious intention, 177.

in treason expressed by the word proditorie, ib.

in felonies, by the word *felonice*, ib.
 express allegation of intention, when necessary, ib.
 distinction between offences resting in tendency and others,
 177, 8.
 in case of libel, 178.
 in indictment on statutes, ib.
 where the stat. is silent, an allegation as to intention unnecessary, 178, 9, 442. See note (l).
 bare intention not indictable in general, 179.
 when a criminal intention will render an act indictable, ib.
 in what cases the allegation of intention is merely formal,
 179, 180.
 when material, 180.
 when advisable to state an intention which is not essential
 to the principal offence charged, ib.
 the same acts may be laid with different intents, ib.
 the means by which the intention is to be accomplished need
 not in general be specified, ib.
 but the intent must be proved as laid, 181.
 burglary laid with one intent, not proved by evidence of a
 breaking, &c. with different intent, ib.
 burglary laid with a larceny, not proved by evidence of a
 burglary with intent only, ib.
 See *Index to Precedents*, tit. *Assaults*.

IRON RAILS,
 stealing of, 477, 8.

J.

JOINDER,
 of parties and offences, chap. II. 31.
 torts several in their nature, ib.
 where several must be joined from the nature of the offence,
 ib.
 in case of conspiracies, 31, 2.
 non-repair of highway, 32.
 too many may be joined, ib.
 when several may be jointly indicted, ib.
 of several for the same offence, 32, 3.
 general rule, 32.
 under the Black Act, 33, 4.
 for a conspiracy, publication of same, libel, &c. &c. 33, 4, 5.
 though the offences differ in degree, 34, 5.
 petit treason and murder, ib.
 murder and manslaughter, 35, 6.
 principals, aiders, and abettors, ib.

accessories, *ib.*
 in what cases the rule does not warrant a joinder, *ib.*
 effects of misjoinder, 35, 6, 7.
 when several ought to be joined, 36, 7.
 upon a joint indictment some may be convicted and the rest acquitted, 37, 8.
 so some may be convicted of offences differing in degree, *ib.*
 of several offences against the same defendant, 38, 9, 455, 6.
 when objection is to be taken, 38, 9.
 usual practice where the indictment includes several distinct charges, *ib.*
 same act may be differently described, 39, 40.
 where special description includes a more general offence, the defendant may be acquitted of the former and convicted of the latter, 39, 40, 1.
 instance of this, *ib.*
 of a count for felony, with a count for a misdemeanor, ground of demurrer, &c. 43.
 several misdemeanors may be joined in the same indictment, *ib.*
 of different persons and different offences, *ib.*
 not a ground of demurrer, *ib.*
 but the court in its discretion will quash the indictment, *ib.*
 to warrant a joinder, offences must be of the same nature, &c. 44, 455, 6.
 distinct felonies ought not to be joined in the same indictment, *ib.*
 unless they arise out of the same transaction, *ib.*
 as in case of principal and accessory, *ib.*

JUDGMENT,

how the defendant is brought in to receive judgment, 359, 60.
 new trial, when granted, *ib.*
 time of moving for, *ib.*
 all the defendants must be present in court, 360, 1.
 time allowed for moving in arrest of, *ib.*
 at the assizes or quarter sessions, *ib.*
 in what cases defendant, upon being brought up to receive judgment, may plead that he is not the same person, 360, 1, 2.
 what defects may be taken advantage of by motion in arrest of judgment, 361, 2.
 different kinds of judgment, *ib.*
 high treason, *ib.*
 in case of a woman, 362, 3.
 treason relating to the coin, *ib.*
 felony, *ib.*
 murder, by stat. 25 G. 3. c. 37. 362, 3, 4.
 form of the sentence, 363, 4.

hanging in chains no part of the sentence, 364, 5.
 extends to peers, ib.
 to cases of petit treason, ib.
 præmunire, ib.
 misprison of treason, ib.
 petit larciny at common law, ib.
 under the statutes, ib.
 for crimes below the degree of felony, ib.
 villainous judgment, ib.
 the courts cannot introduce new modes of punishment, 365, 6.
 offender may be fined in his absence, ib.
 but cannot be sentenced to corporal punishment in his absence, ib.
 a joint fine is erroneous, ib.
 in case of nuisance, ib.
 during the term remains in the breast of the court, ib.
 after the term, &c. cannot be altered, ib.
 how reversed, 367.
 by plea founded on defect apparent on the record, 367, 8.
 by plea founded on matter of fact extrinsic of the record, 368.
 outlawry, in what cases defendant may appear by attorney in order to its reversal, ib.
 what may be pleaded in avoiding of, ib.
 mis-description of name, &c. ib.
 where there are two persons of the same name, &c. 369.
 writ de idemptitate, ib.

JURORS, 41, 2.

default of, 341, and Appendix Note to p. 341.

JUSTIFICATION,

See *Plea*, and also Appendix Note to p. 334,

K.

KNOWLEDGE,

criminal, when to be averred, 163, 4, 5.
 whether the averment necessary in an indictment against accessory for the receipt of an *attainted* felon, 164, 5.

L.

LARCINY,

- simple larciny, indictment for, 449.
- venue, ib. *Appendix Note to p. 10.*
- where goods stolen elsewhere are brought into the body of a county, ib.
- description of the property stolen, 192, 449, 450.
- of ownership, ib.
- of value, ib. and 199, 200.
- requisites of the indictment, 449, 50.
- as to value, ib.
- See *Moveables*, description of.
- indictments against particular persons, 450, &c.
- servants, under the stat. 21 H. 8. c. 2. 452.
- clerks, under the stat. 39 G. 3. c. 85. 452, 3.
- for stealing particular property, or from particular places, 465, 6.
- lodgings, ib. &c.
- from a bag sent by the post, 458.
- for a mail robbery, 469.
- for stealing conies, &c. 461.
- for stealing a gelding, 462.
- for stealing fish, ib.
- for stealing deer, 433.
- for killing a sheep with intent to steal, &c. 465.
- for stealing shrubs from a garden, 466.
- indictment for stealing chose in action, 467.
- to the value of forty shillings in a dwelling house, 467, 8.
- to the value of five shillings in a shop, ib.
- to the value of forty shillings in a dwelling-house, putting the owner in fear, 469.
- for stealing from a chapel, 470.
 - from a church, 472.
 - from the person, 473.
- for robbery from the person, 473, 4.
- for stealing linen from a bleaching croft, 474.
 - woollen cloth from the tenters, 475.
 - from a ship wrecked, 476.
 - from a ship in a navigable river, 477.
 - lead fixed to a dwelling-house, 477, &c. &c.
- See *Index of Precedents*, tit. *Larciny*.
- petit larciny, indictment for, should express the value, 198, 9.
- how it differs from grand larciny, 451, note (e).

LEAD,

- stealing of lead affixed to a dwelling-house, 477, 8.

stat. 21 G. 3. c. 68. ib.

a church is a building within the stat. 479.

LETTERS,

stealing of, 456, 7.

stat. 7 G. 3. c. 50. s. 2. ib.

stat. 52 G. 3. c. 143. s. 3. 458.

in what county the indictment to be laid, ib.

letter, how described, 458, note (t).

LIBEL,

indictment for, 123.

what averments are necessary, 123, 4.

nature and use of an *innuendo*, 131, 2, and see 118, 2.

See tit. *Solicitations*, see *Index of Precedents*, tit. *Libel*.

LINEN,

stealing of, 474, 5.

from a bleaching croft, ib.

stat. 51 G. 3. c. 41. ib.

LODGINGS,

3 & 4 W. & M. c. 9. s. 5. 456.

name of owner essential, ib.

the stat. does not apply where the whole house is taken, ib.

M.

MAGISTRATES,

information against, see *Index of Precedents*, tit. *Offar*.

in what cases an information or indictment maintainable against them, 593, 5, 6, &c.

MAIL,

robbery of, see *Letters*, and see p. 459.

MAINTENANCE,

offence of, how averred, 158, 9.

See *Index to Precedents*.

MALICIOUS MISCHIEF, 576, &c.

See *Index of Precedents*, title *Malicious Mischief*.

destruction of goods, frame-work, &c. 586, 7, &c.

stat. relating to, ib.

malicious wounding, maiming, and killing, 579, 80, &c.

malicious cutting under the stat. 43 G. 3. c. 58. 580, 1.

shooting, ib. and 581, 3, 4.

administering of poison, 585, 6.

attempting to poison, *ib.* and 663.
 to shoot, 579, 80, 1.
 to procure abortion, *ib.* and 585, 6.
 to procure miscarriage, *ib.*
 words, "sharp and cutting instrument," whether essential,
 581, 2, 3.

MAYHEM,

technical words of description, 77, 8.

MISCONDUCT IN OFFICE,

how to be averred in general, 149.
 indictment against a constable, *ib.*
extortion,
 whether it may be alleged generally, 149, 50, 1.
 what averments are proper in an indictment for extor-
 tion, *ib.*
 that he took and received, *ib.*
 a *specified* sum, &c. 150, 1, 3.
 that he took it *extorsive*, 150.
 under what pretence, 150, 1.
 whether *colore officii* generally sufficient, 152, 3.
 the quantum taken, 152, 3, 4.
 by threat of legal process, *ib.*
omission to perform a duty,
 indictment for, must set out the circumstances of the
 default, 154, 5.
 the situation of the highway or bridge out of repair, *ib.*
 and the extent of the evil complained of, *ib.*

MISNOMER,

See *Abatement*.

MISCARRIAGE,

attempt to procure, 585, 6.
 the name of the drug immaterial, *ib.*

MONEY,

description of, 199, 200.
 what it includes, 469.
 indictment for putting off counterfeit milled money, &c. un-
 der the stat. 8 and 9 W. 3. c. 26. must aver that it was
 not cut in pieces, 172, 3.

MOVEABLES,

description of, 192.
 must be specific, *ib.*
 with what certainty, 192, 3.
as to the nature of the chattel itself, 193.
 degree of certainty requisite, *ib.*
 when the subject matter is defined by a stat. *ib.*
animals fera nature, what description requisite, 194.
 of fish under different stat. *ib.*

choses in action, under 2 G. 2. c. 25. 194, 5, 6.
 description under this act, 196.
 should be laid as the *property*, &c. 197.
quantity,
 must in general be ascertained by an averment of *magnitude*.
 weight, or number, 197, 8.
magnitude, 197.
weight, *ib.*
number, 198.
 variance when material, 198, 9, 200, 1.
 See tit. *Number, Value, Ownership*.

MULTIPLICITY,

to be avoided in pleading, 144, 177.
 will justify a general allegation, *ib.*

MURDER,

indictment for county, trial, 12, 13.
 means and manner, 91, 2, 3.
 original meaning of the term, 386, note (s).
 formerly no distinction between murder and manslaughter as
 to punishment, 386.
 statutes ousting of clergy in case of murder, *ib.*

N.**NAME,**

and addition at common law, 45, 6, 7.
 misnomer of christian or surname, *ib.*
 whether person can have two christian names, *ib.*
 replication to a plea of misnomer, 47.
 plea of misnomer must shew the real name, *ib.*
 other instances, where the name of a person mentioned in
 the indictment may be dispensed with, 188.
 selling beer in unlawful measures, to divers persons unknown,
 ib.
 See tit. *Ownership, Moveables, &c.*

NAVIGABLE RIVER,

stealing from ship on, 477.
 See *Ship*.
 works on, county trial. 12.

NEGATIVE AVERMENTS,

are necessary if the exception be contained in the *enacting*
 clause, 175, 6.
 or in a clause to which the *enacting clause* immediately re-
 fers, *ib.*

NEW TRIAL,

not granted in case of acquittal, 357, 8, 9.
 otherwise in case of conviction, *ib.*
 time of moving for, 359, 60, 1.
 where some have been acquitted and others convicted, *ib.*
 all must be present upon the motion, 360, 1.

NOT GUILTY,

what an individual may shew upon plea of, 808.
 nature of the plea, 338.
 See *tit. Plea.*

NOTES,

indictment for stealing, 453, 4.
 how the property to be described, 454.
 See *Chose in Action.*

NUISANCE,

indictments for, 683, &c.
 See *Index to the Precedents, tit. Nuisance.*

NUL TIEL RECORD,

cannot be pleaded by a defendant in a criminal case, 317.
 See *Auterfoits Acquit, Plea.*

Q.

OBSCENE PRINT,

publishing of, 663.

OFFICE,

offences relating to, 593, &c.
 how alleged, 593, 4.
 See *Misconduct in Office.*
 See *Index of Precedents, same tit. and tit. Misconduct.*

OVERSEER,

refusal to take the office of, after a due election, 618, 9.
 See *tit. Contempt, Misconduct, Refusal.*

OWNERSHIP,

in general must be alleged, 200, 1.
 omission of, when allowable, 201, 2.
 of coffin, &c. how laid, *ib.*
 when in an executor, *ib.*
 administrator, *ib.*
 ordinary; *ib.*
 in some person unknown, *ib.*
 as *bona ecclesie*, *ib.*
 in the parishioners, *ib.*

churchwardens, *ib.* *Appendix Note* to p. 201.
 commissioners, 202, 3.
 stage coachmen, *ib.*
 landlord of an inn, *ib.*
 bailee, *ib.*
 agister of cattle, *ib.*
 trustees, 203, 4.
 corporation, *ib.*
 feme sole, *ib.* *Appendix Note* to p. 201.
 infant, *ib.*
 bankrupt, *Appendix Note* to p. 201.

Of particular property,

coffin or winding sheet, 201.
 goods of a church, &c. 202.
 goods of a parish, *ib.*
 lead affixed to a church, 202, 3.
 goods of a chapel, 203.
 goods stolen from stage coach, *ib.*
 from a bailee, *ib.*
 an agister, *ib.*
 from a servant, 203, 4.
 from trustees, *ib.*
 of a feme sole who marries before indictment, *ib.*
 of a child, 204, 5.
 wreck, under 26 G. 2. c. 19.
 name of owner, 205.
 reputed name sufficient, 205, 6.
 of the *goods and chattels*, 206.
 animals should not be so alleged, *ib.*
 inaccuracy or repugnancy in the description, fatal to the
 indictment, 206, 7.
 trustees, how described, 204.
 corporation, body corporate, how described, *ib.*
 variance from description of, 206, 7.
 allegation of, in general necessary, *ib.*

P.

PARDON,

plea of, 333.
 pardon, how taken advantage of, *ib.*
 plea of, when by letters patent, *ib.*
 defendant ought not to plead over, 344.
 but if plea be insufficient, allowed to plead to the felony, *ib.*

PARISH,

- indictment against, for not repairing an highway, must aver that the road lies within the parish, 692, 3.
- that it is an highway, *ib.*
- that it is out of repair, *ib.*
- common law liability of parish, 693, 4, 6, 7.
- plea of, to an indictment for the non-repair of an highway, 798.
- what they may shew under the general issue, *ib.*
- in what cases the ground of discharge must be pleaded, *ib.*
- general liability of parish where the liability of an individual ceases, *ib.*
- plea by, ought to traverse the obligation to repair, 799, 800.
- that individuals are liable *ratione tenuræ*, 800, 1.
- that particular townships are liable to the repair, 803, 4.
- how the prescription in such case should be pleaded, *ib.*
- each district ought severally to claim the exemption, *ib.*
- that the inhabitants of a particular liberty ought to repair, 805, 6.
- that particular persons ought to repair, 806, 7.

PEER,

- how described, 45, 9, 50, 206.
- of foreign nation, *ib.*

PERJURY,

- indictment for, 113.
- formerly drawn with great prolixity, *ib.*
- 23 G. 2. c. 11. made in order to remove difficulties, *ib.*
- enactments of that statute, *ib.*
- allegations necessary in an indictment for perjury.
 1. that a cause, &c. is depending, 114.
 - proceedings not to be set out at length, 114, 5.
 2. before a court of competent jurisdiction, *ib.*
 - what form sufficient, *ib.*
 - where perjury is committed at the assizes, *ib.*
 3. that the matter sworn to was material, 115, 6.
 - how averred, *ib.*
 - need not be expressly made in all cases, 116, 7.
 4. the substance of the matter sworn must be set forth, 117.
 - with what precision, *ib.*
 - innuendo, definition of, *ib.*
 - use of, 118.
 - must not enlarge the sense, *ib.* and 119, 120.
 - when new matter introduced by an innuendo, may be rejected as surplusage, 120.
 - in what cases a faulty innuendo cannot be rejected, 120, 1.
 - when committed in affidavit, how the matter is stated, 121.

5. assignment of perjury.

general rule as to, *ib.*

indictment for, under stat. 5 Eliz. 80.

word *wilful*, necessary under the stat. 5 Eliz. c. 9. 80.

a man may be indicted for, though he swear to belief only, 550, 1.

taking a false oath in order to obtain administration to a seaman, 553, 4.

stat. 31 G. 2. c. 10. s. 24. *ib.*

different indictments for, 533, &c.

different stats. relating to 5 Eliz. c. 9. s. 3. 533.

2 G. 2. c. 25. s. 2.

8 G. 2. c. 18. 533, 4.

See *Index to Precedents*, tit. *Perjury*.

in an indictment for perjury in an affidavit to hold to bail, it is unnecessary to set out the jurat, 544.

Appendix Note to page 116, 7.

PERSONATION,

stat. 4 W. & M. c. 4. 529.

as to bail, *ib.*

PERSONS,

certainty of, 182.

name of person killed, 182, 3.

of the owner of the dwelling-house, in burglary, 183.

stealing in a dwelling-house, *ib.*in case of arson, *ib.*both christian and surname to be specified, *ib.*

name of the owner of property stolen, 184, 5.

See tit. *Ownership*.need not be described as in the peace of God, &c. *ib.*may be described by his usual name, *ib.*inconsistency or uncertainty in the description of the person, *ib.*

variance from the name, 185, 6.

exceptions to the general rule, *ib.*when sufficient to say *cujusdam ignoti*, 185, 6, 7, 8.

but the court will, in its discretion, interfere if there be no necessity for such an averment, 188.

reason why such allegations were formerly held to vitiate the indictment, *ib.*how *autrefois acquit* to be pleaded to such an indictment, *ib.*

stealing from the person, 473.

stat. 48 G. 3. c. 129. s. 2. s. 4. *ib.*

robbery from the person, 473, 4.

PETIT TREASON,

acquittal of, is a bar to an indictment for murder, 324.

See p. 41, 2. and *Index to Precedents*, same title.

PHEASANT,

description of, 194.

PIRACY,

indictment for, 480.

stat. relating to, 15, &c.

PLACE,

averment of, 62.

necessity for, 62, 3.

in what places material facts may be laid, 63.

intendment of law, that the place is a vill, 64.

if there be no such place or vill the indictment is void, *ib.*

vill must be shewn to be within the county, *ib.*

when referred to the county in the margent, 64, 5.

express reference should be made in criminal cases, 65.

but is unnecessary in civil cases, *ib.*

where the city is a county of itself, *ib.*

defective venue, how excepted to, *ib.*

uncertainty in the county, *ib.*

conclusion of law need not be averred with time or place,
65, 6.

but if defectively averred will avoid the indictment, *ib.*

from and *unto*, construction of, *ib.*

variance from the place alleged, when immaterial, *ib.*

repetition of place, when necessary, *ib.*

allegation of place, when unnecessary, 66, 7.

description of,

in case of burglary, 188, 9.

arson, 189.

stealing in dwelling-house, *ib.*

from lodgings, *ib.*

ownership of dwelling-house, 188, 9.

variance from such description, where material, 189, 90.

description of an highway, 190, 1, 2.

unto, construction of, 191.

to and *from*, construction of, *ib.*

place, &c. must be shewn to be within the county, 191, 2.

extent of local nuisance must be shewn, 192.

PLEA,

different kinds of pleas, 310.

to the jurisdiction, *ib.*

declinatory plea, *ib.*

plea in abatement, *ib.*

demurrer, *ib.*

plea in bar, *ib.*

plea to the jurisdiction,

what it denies, *ib.*

what may be pleaded, *ib.*

judgment, if plea be overruled, *ib.*

declinatory pleas, 311.

privilege of sanctuary, *ib.*

has been long abolished, *ib.*

benefit of clergy, *ib.*

seldom pleaded, *ib.*

disadvantage of pleading it, *ib.*

plea in abatement, *ib.*

See *tit. Abatement*.

demurrer. See *Demurrer*.

plea in bar,

auter-foits acquit.

auter-foits convict.

auter-foits attain.

pardon.

See these titles respectively.

no *justification* pleadable to indictment for treason or felony, 334, 5.

special plea to an indictment for misdemeanor, 335.

what may be pleaded, *ib.*

pendency of one information *qui tam* pleadable to a second, *ib.*

and fraud may be replied, *ib.*

son assault demesne no plea to an indictment for assault and battery, *ib.*

in what cases the general plea of not guilty is sufficient, *ib.*

in indictment for the non-repair of an highway, in what cases a special plea is necessary, 336.

See *tit. Parish, Highway*.

where different districts within a parish have been accustomed to repair their highways, *ib.*

form of the plea in such case, 336, 7.

how defendant to be charged in respect of tenure, 337.

prescription, when necessary to be alleged, 337, 8.

where the obligation arises from inhabitancy, 338.

who may be bound by prescription without tenure, *ib.*

plea by county of liability of individual who has been convicted, *ib.*

general issue, *ib.*

admits special defence in evidence, 339.

as of justification or excuse, *ib.*

pleadable in capital cases after a special plea has been overruled, *ib.*

is not a waiver of a special plea, *ib.*

is no waiver of a pardon, *ib.*

party arraigned for murder, after a pardon of the manslaughter, 339.

how he should plead, *ib.*

nature of plea to an indictment for felony, 320.

- two branches of this plea, 340.
- when prisoner said to stand mute, ib.
- course in such case, ib.
- course upon an indictment, &c. for a misdemeanor, where the defendant refuses to plead, ib.
- issue in such case how joined, ib.
- addition of officer unnecessary, ib.
- special plea seldom resorted to, ib.

PLEADING, TIME FOR,

- in case of treason or felony, defendant must plead *instantly*, 305.
- so in case of misdemeanor, if he appear upon the *capias*, ib.
- so if he appear on his recognizance, ib.
- if he appear upon summons to venire or subpoena, entitled to an imparlance, ib.
- in what cases he must try the same term, ib.
- in what cases not till succeeding term, ib.
- time of pleading to an information, 306.
- when laid in Middlesex, ib.
- when laid in another county, ib.
- in capital cases no rule to plead ever given, ib.
- in such cases all the proceedings are at bar, ib.
- rule to plead in case of misdemeanors, ib.

POISON,

- administering of poison with intent to murder, 663.
- See tit. *Attempt*.

PRÆMUNIRE,

- indictment for, must allege "with intent, &c," 220, 21.

PRESENTMENTS,

- are within the stat. of additions, App. note to p. 48, 9.

PRINCIPALS,

- in second degree, how charged, 81, 2.
- when ousted of clergy, 82 to 87.

PROCESS,

- indictment cannot be tried, unless the party has appeared, 272.
- but may be found against him in his absence, ib.
- Of the capias*, 272, 3.
- requisition of, 273.
- teste of, ib.
- from the K. B. ib.
- quarter sessions. ib.
- in case of county palatine, ib.
- must be in the name of the king, ib.
- by what courts issued, ib.
- direction of, ib.
- what justices may issue, ib.

- justices of gaol delivery cannot, 273.
- justices of oyer and terminer may, ib.
- when against a peer, 275, 6.
- See *Capias*.
- return of sheriff on, ib.
- writ of *exigent*, ib.
- in what cases it issues after the first *capias*, ib.
- in what cases a second *capias* is necessary, ib.
 1. in the case of *accessories*, ib.
 2. of indictments of felony before justices in their sessions, ib.
 3. where the party resides in another county, 276.
- In case of accessories*,
 - enactment of the stat. 1 West. ib.
 - to what cases it extends, ib.
 - whether to indictments, ib.
 - not intended to alter the common law, ib.
 - process against accessories, after the return of *non est inventus* to the *capias* against the principal, ib.
 - how continued against accessories, ib.
 - in case the accessory appears to the *capias*, ib.
 - where one is indicted as accessory to several, 277.
 - in case of appeal, ib.
 - remedy for defendant, in case the *exigent* issue against both, ib.
 - whether appellor, taking out *exigent* against all as principals, can count against any as accessories, ib.
 - in what cases a second *capias* is necessary, ib.
- 2. *where a man is indicted before justices in sessions*, 278.
 - enact. of 23 E. 3. stat. 5. c. 14. ib.
 - stat. does not extend to treason, ib.
 - nor to a court of oyer and terminer, ib.
 - whether sheriff must be commanded to take the goods, 279.
- 3. *where the defendant is resident in another county*, ib.
 - by common law no *capias* issued to another county, ib.
 - vexatious consequence of this practice, ib.
 - remedy provided by stat. 6 H. 6. c. 1. 279, 281.
 - by 8 H. 6. c. 10. 279, 80.
 - 8 H. 6. c. 10. s. 6. 281.
 - 10 H. 6. c. 6. ib.
 - place, of which party to be named under these stat. ib.
 - application of these stat. to particular cases, 281, 2.
 - defendant named of a county palatine, 282.
 - to whom process directed in such case, ib.
 - outlawry pronounced contrary to these stat. voidable only, and not void, ib.
 - writ of *exigent*, 282.

- in what cases it issues on return of *non inventus* to first capias, 282, 3.
- requisition of, to sheriff, 283.
- to exact the defendant at five successive county courts, &c. ib.
- if there be not five before the return of the writ, ib.
- return of outlawry to the exigent, ib.
- certainty of, ib.
- as to the place of holding the court, ib.
- day and year of each exaction, 284.
- return of outlawry, 284, 5.
- effect of outlawry, 285.
- See tit. *Outlawry*.
- proclamations*, stat. of, 285, 6, 7.
- requisites of the writ, 286.
- return of, 286, 7.
- process* in case of *misdemeanor below felony*, 287.
- venire facias ad respondendum*, ib.
- distringas on non appearance, ib.
- if *nihil* be returned to the venire, 288.
- capias, alias, and pluries, ib.
- process where capias does not lie, ib.
- against hundredors, &c. ib.
- practice to award a capias on certificate of indictment found, ib.
- before the stat. 48 G. 3, c. 58. ib.
- usual practice on indictment found, ib.
- effect of outlawry, 288, 9.
- process directed by stat. 48 G. 3. c. 58. 289.
- warrant to be issued on certificate of indictment or information filed, ib.
- where defendant is in custody, &c. copy of information or indictment to be served, &c. 290.
- with notice to appear and plead, &c. in eight days, ib.
- on default, appearance to be entered for him, ib.
- and such proceedings to be had, as if the defendant had appeared and pleaded, ib.
- 60 G. 3. c. 4. from p. 290 to 293.
- upon information by a common informer, ib.
- enactment of stat. 21 J. 1. c. 4. 293, 4.
- upon default, 294.
- where the default is before issue joined, ib.
- where it is after, ib.
- of defects in process, ib.
- discontinuance*, kinds of, 295.
 1. where there is a total chasm in the proceedings, ib.
 - such defect not cured by appearance, ib.
 2. where the continuance is defective, ib.
 - such a defect is cured by appearance, ib.

in process against jurors, 296.
 effect of, *ib.*
 will not abate the original proceeding, *ib.*
mistrial, what will occasion, *ib.*
 instances of, *ib.*
miscontinuance, what, 297.
 cannot be excepted to even before plea, *ib.*
 criminal cause, *when put without day*, 298.
 ancient practice in such case, *ib.*
 by demise of the crown, *ib.*
 enactment of stat. 4 & 5 W. 3. c. 18. and 1 Ann. c. 8. *ib.*
 effect of error in process of outlawry, *ib.*

PROCLAMATIONS,

statutes and writ of, 285, 6, 7.
 See *tit. Process, Outlawry.*

PROFANE OATHS AND CURSES,

indictment for, 123, 4.

PROVISIONS,

unwholesome selling of, 682, 3.
 unnecessary to specify the noxious materials, *ib.*
 indictment maintainable, though the provisions be supplied
 under a contract, 683, 4.

PUBLIC HOUSE,

refusal to license, 595, 6.

Q.

QUANTITY,

stolen or extorted must in general be specified, 153, 4,
 196, 7.
 threatening letter must be set out in the indictment, 154, 5.

QUASHING,

of an indictment, &c. ch. 17.
motion to quash an indictment or information, 299.
 discretionary in the court to grant it, *ib.*
 not usual to quash, unless the defect be gross and apparent,
ib.
 time of making the application, *ib.*
 when granted at the instance of the prosecutor, 300.
 when the defendant has been put to expense; *ib.*
 where a second indictment is found, pending the first, *ib.*
 after a removal by certiorari, *ib.*
 must be made before plea, *ib.*

in case of information,
 by the attorney-general, ib.
 by a private person, ib.
 at the instance of the defendant, 301.
 when allowed, ib.
 when indictment is insufficient, ib.
 where the court wants jurisdiction, ib.
 for mere want of form, ib.
 for misjoinder, ib.
 for want of a substantial allegation, ib.
 where the facts charged are not indictable, 302.
 refused when the offence is of a very heinous nature, ib.
 in cases of treason and felony, ib.
 extortion, perjury, &c. 302, 3, 4.
 at what time the motion may be made, 303, 4.
 special provision as to indictment for treason by the stat.
 7 W. 3. c. 3. 304.
 must be made before evidence given, ib.
 and before plea pleaded, ib.
 for what defects, ib.
 no objection to be made to certain faults in arrest of judgment, ib.
 but judgment still liable to be reversed by writ of error, as before, ib.

R,

RAPB,

technical description of, 77, 8.
 See *Index of Precedents*, tit. *Rape*.

RECEIVING STOLEN GOODS,

Indictment for the misdemeanor,
 need not name the principal felon, 168, 9.
 nor aver the original felony with time or place, ib.
 indictment will lie for receiving the goods, if they remain the same in substance though altered in name, 169, 70.
 stat. relating to, 481, 2, 3, 4, 5, 6.
 indictment against, must allege that the goods are worth more than one shilling, 169, 70.
 property alleged to have been received, should agree with that alleged to have been stolen, ib.
 but the word *chattels* has been rejected as surplusage, ib.
 the receiver of a traitor should be specially charged with the receipt, ib.

unnecessary to negative the conviction of the principal in an indictment against the receiver for a misdemeanor, 30, 171, 2.

REFUSAL,

to watch with constable, 602.
by an headborough to convey a person to prison, upon a commitment by a magistrate, *ib.*
to obey an order of sessions, 603.
to secure one who had committed a breach of the peace, 605.
by a constable to return presentments at the assizes, 606.
by an overseer to pay a weekly sum to a pauper, under an order of justices, 607.
whether requisite in such case need be alleged, 608, 9.
See Constable, Contempt, &c.

REGRATING,

indictment for, 680, 1.

REPLICATION, 813.

See Index of Precedents.

RESCOUS,

indictment for, must shew that the party rescued was in legal custody, 167, 8, 642. &c.
See Index to the Precedents, tit. Rescue.
forcible under the Black Act, 578.

REVERSAL OF JUDGMENT,

whether person taken on a *capias utlagatum* may plead that he is not the person outlawed, 369.
defendant cannot, before outlawry, plead that he is not the person, *ib.*
but must resort to his writ *de idemptitate nominis*, *ib.*
what outlawries may be reversed on a plea of, *ib.*
matter of fact, *ib.*
for treason, 370.
where party is out of the realm, *ib.*
provisions made by stats. 26 H. 8. c. 13. 5 & 6 E. 6. c. 11.
extend to treasons made by subsequent stat. *ib.*
where given without authority, *ib.*
falsification of record as to the time of the offence, *ib.*
as to the offence itself, *ib.*
by writ of error, 371.
in what courts it lies, *ib.*
when grantable, *ib.*
by whom it may be brought, *ib.*
situation of defendant on the reversal of judgment, 371, 2.
if outlawed before plea, *ib.*
if outlawed after conviction, *ib.*
where the judgment has been founded on conviction, *ib.*
liable to a second prosecution, *ib.*

if his lands have been granted away, may resume possession, *ib.*

RIOTS,

indictment for, 667, &c.

See *Index to Precedents*, tit. *Riots*.

riot act, 668.

RIVER,

indictment for obstructing, 687, 8.

dow described, 687, 8, 72, 3.

ROBBERY,

from the person, 473, 4.

how described, *ib.*

stat. ousting of clergy, *ib.*

on the highway, *ib.*

ROBBING,

of a dwelling-house, what it implies, 469.

S.

SABBATH,

indictment for keeping open shop on Sundays, 692.

SACRILEGE,

indictment for, 470, 2, 3.

See *Chapel*.

property, how described.

See *Moveable, Ownership*.

SCILICIT AND VIDELICET,

absence of, will not render stricter proof necessary, 252, 3.

in case of murder, *ib.*

extortion, &c. *ib.*

when useful in order to avoid a variance, 252, 3, 4.

but in such cases not absolutely essential, 254.

Gilham's case, 255.

SEDITIONOUS WORDS,

indictment for, 652.

See *Libel, Solicitations*.

SERVANTS,

indictment against, under the stat. 21 H. 8. c. 2. 452.

must be servant both at the time of the delivery and of the running away, *ib.*

SHEEP,

killing of, with intent to steal part of the carcase, 465.
stat. 14 G. 2. c. 6. s. 1. ib.

SHIP,

stealing from, on a navigable river, 476, 7.
stat. 24 G. 2. c. 45. ib.

SHOP,

stealing in, to the value of 5s. 468.
stat. 10 & 11 W. 3. c. 23. s. 1. ib.
construction of this stat. 469.

SHRUBS,

stealing of, from garden, &c. 466.
stat. 6 G. 3. c. 36. s. 1. ib.

SITUATION,

or character of party, how averred, 162, 3, 4.
how proved, 164.
sufficient to allege that he was such officer, &c. ib.

SOLDIER,

endeavour to seduce, 651.
See *Endeavour, Solicitations.*

SOLICITATIONS, ILLEGAL,

indictments for, 123, 651.
in what cases the means should be set out, 123.
words spoken of a magistrate, ib.
profane oaths or curses, ib.
blasphemous or seditious words, 123, 4.
libels, how set forth, ib.
ad effectum insufficient, ib.
resolution of all the judges in Sacheverel's case, ib.
rule does not extend to indictment for treason, 125.
reason of this, ib.
libel formerly set out in Latin, 126, 7.
or by the sense, 126, 7, 8.
must be accurately set out, 128, 9.
variances from omission, when fatal, 128, 9, 30, 1, 2.
form of setting forth the libel, 130, 1, 653.
of setting forth selected passages in the same count, 131, 2.
when the libellous quality is derived from extrinsic circumstances, how the connection of the libel with those circumstances should be shewn, ib.
in cases of solicitation the *means need not be specified* where they are indifferent, provided the end be accomplished, 138 to 142.
but where the offence rests in *tendency*, the means used must in general be specified, 143.
but need not (from the necessity of the case) where the means are of a complicated nature, 144.

a mere solicitation, not followed by any act, formerly not indictable, 144.

but the contrary is now settled, 145, 6.

general words descriptive of an attempt, endeavour, or solicitation, 146.

aiding and assisting prisoner to escape, how averred under the stat. 16 G. 2. c. 31. *ib.*

endeavour to seduce soldier, under 23 G. 3. c. 13. how averred, 147.

solicitation to commit larceny, how averred, 148.

unnecessary to negative the actual commission of the felony, 149.

solicitation to commit a felony, indictment for, 666.

See *Index to Precedents*, same *tit.*

STABLE,

stealing in, 469.

STATUTE,

indictment on, 212, 13.

same certainty requisite in an indictment on a statute, as in an indictment at common law, *ib.*

and frequently insufficient to pursue the words of the stat. *ib.*

description in both kinds of indictments governed by the same general rules, *ib.*

insufficient, in case of a conviction, to pursue the words of the statute, 213.

rules *peculiar to indictments on stat.* *ib.*

where the stat. is of a public nature it ought not to be recited, 214.

but a private stat. must be pleaded, *ib.*

time and place of making the stat. 214, 215.

repugnancy in description fatal, *ib.*

commencement of stat. regulated by 33 G. 3. c. 13. 215.

title and preamble of the stat. 215, 16.

need not be set forth, 216.

whether mis-description would be fatal, *ib.*

recital of the purview, *ib.*

mis-recital, when fatal, 216, 17.

when cured, 217.

where the sense is not altered, *ib.*

trifling variances formerly held fatal, 218, 19.

But the courts have relaxed from their former strictness, *ib.*

rule at the present day, *ib.*

offence, how to be described in reference to the circumstances mentioned in the statute, 220.

all the circumstances contained in the definition must be set out, *ib.*

the same rule applies to *convictions*, 221, 2.
 person indicted of larciny, ousted of clergy under 3 & 4
 W. & M. c. 1. unnecessary to make any entry on the re-
 cord, *ib.*
 but the offence charged must amount to grand larciny,
 222, 3.
negative description contained in stat. defendant must be
 brought within it, *ib.*
 provisos and exceptions, *ib.*
 must be noticed in the purview of the act, *ib.*
 omission of a material circumstance not cured by the general
 conclusion *contra formam*, 223, 4.
 whether necessary to allege, *expressly*, that the offence was
 committed after the making of the act, 224, 5.
 where circumstances which will oust the offender of his
 clergy are disjunctively enumerated, a disjunctive allega-
 tion is sufficient, 224, 5, 245, 6.
 with respect to the terms and phrases used in the statute,
 224, 5.
 indictment must contain all the material words, *ib.*
 same rule applies to common law offences punished by a
 stat. 225, 6.
 instances, perjury, offences under the Black Act, &c. *ib.*
 case of the regicides, 226, 7.
 words of stat. in some instances have been dispensed with,
ib.
 in indictment against accessory before the fact, to a murder
 under the stat. 4 & 5 Ph. & M. c. 4. 227.
 observations on this decision, 228.
 conclusion *contra formam*, *ib.*
 when necessary, *ib.*
 where the offence is created by a stat. *ib.*
 or is made a crime of an higher degree, 229, 30.
 when offence existed at common law, *ib.*
 but offender deprived by stat. of some benefit, *ib.*
 offence existed at common law, additional punishment in-
 flicted by stat. *ib.*
 where the statute is declaratory, *ib.*
 whether the averment may be rejected as surplusage, 230.
 where several stats. relate to the same offence, *ib.*
 one statute made perpetual by a second, 231.
 one stat. continued by another, *ib.*
 where one stat. creates the offence and another adds the pe-
 nalty, *ib.*
 where one stat. is explained by several others, 232.
 improper conclusion, effect of, *ib.*

STOLEN GOODS,

helping to, 486.

See *Receiving, Accessories, &c.*

SUBORNATION,

indictment for, 554.

SUMS AND VALUE,

value must in general be averred, 198, 9.

price, averment of, when proper, *ib.*

value, necessary to distinguish between grand and petit larciny, *ib.*

whether necessary in case of petit larciny, 198, 9, 200.

value of money which is of the current coin of the realm need not be alleged, 199, 200.

value of each individual article should be alleged, *ib.*

variance as to value, &c. when material, *ib.*

immaterial unless it affect either the nature of the offence or the measure of punishment, 200.

in the case of robbery is wholly immaterial, *ib.*

in case of stealing in a dwelling-house, &c. under 12 Ann. excess beyond 40s. immaterial, *ib.*

so in case of illegal brokerage, under 17 G. 2. c. 26. s. 7. *ib.*

in case of usury the quantum must be proved as laid, *ib.*

SURPLUSAGE,

in what cases an allegation may be rejected, 247, 8.

where it might have been wholly omitted, *ib.*

and need not be proved, *ib.*

contra formam, when it may be rejected, 248, 9.

general rule as to rejection of superfluous matter, 249, 50.

in case of an accessory, 250.

of action on penal stat. *ib.*

where the allegation is inconsistent with precedent sensible matter, *ib.*

material and sensible allegation cannot be rejected, though a subsequent material averment be inconsistent with it, *ib.*

matter which shews the charge to be ill founded cannot be rejected, 250, 1.

mistake of matter of law cannot be rejected, though alleged under a *scilicet*, *ib.*

otherwise of matter of fact, *ib.*

scilicet and *videlicet*, use of, 251, 2.

will not protect a material allegation from a traverse, *ib.*

nor can such matter be rejected as surplusage for the sake of a subsequent material allegation, *ib.*

T.

TENOR,

technical import of the word, 255, 6.

THREATENING LETTER,

the letter must be set out, 143.

indictment for sending, &c. 589, &c. &c.

See *Index of Precedents*, tit. *Threatening Letter*.

statutes relating to, 589, 90, 1, 2.

construction of, ib.

valuable thing, construction of, 592.

comprehends a bank note, ib.

TIME AND PLACE,

averments of, 54.

place, averment of, how far substantial, ib.

how far formal, ib.

Time,

indictment must set forth the day and year, ib.

with what certainty, 55.

offence laid to have been committed between two specified days, ib.

if different offences be so laid, indictment defective, 56.

hour, when it should be specified, ib.

allegation of time, when unnecessary, 57.

in case of mere non-feasance, ib.

offence committed at several times, how alleged, ib.

repetition of time and place, when necessary, 57, 8.

how repeated, ib.

in case of murder, 58, 9.

same nicety not observed in cases of misdemeanor, 58.

when a mere repetition is insufficient, 59.

when the time for prosecution is limited, how averred, ib.

uncertainty in day or year, effect of, ib.

offence laid on an impossible day, 60, 1.

until, construction of as applied to time, ib.

when time must be proved as alleged, 61, 2.

when a variance is immaterial, ib.

TRADE,

exporting implements, 678.

offences relating to, ib.

indictments for, ib.

preparing to go abroad, 679.

See *Index to Indictments*, tit. *Trade*.

TRANSITORY

fact may be proved though done in another county, 24.

TRANSPORTATION,

indictments for being at large before term is expired, 645, 6.
&c. &c.

See *Index to Precedents*, tit. *Transportation*.

different statutes relating to the offence, 645, 6, 7.

TREASON,

terms of art, description of, 74, 5.

indictment for, where to be laid, 29, 30.

need not set out the letters, the writing or sending of which
is relied on as the overt act, 124, 5.

treason committed beyond the realm, 19, 20, 1.

35 H. 8. c. 2. construction of, ib.

Scotchmen, when triable for treason committed beyond the
realm, 20, 1.

levying war, when to be proved within the county, 21, 2.

when it may be proved in another county, ib.

judgment in case of high treason, 361.

against a woman, 362.

in case of treason relating to the coin, ib.

of petit treason, ib.

TREES.

malicious cutting down, 576.

stat. 6 G. 3. c. 36. ib.

6 G. 3. c. 48. 577.

distinction between these two stats. ib.

name of the owner must be stated, ib.

destroying, damaging, and stealing of, 577.

TRIAL,

time of,

in what cases the defendant must try the same term, 305.

in what cases not bound to try till the next term, ib.

when party appears at sessions according to his recognizance,
306.

See *County*.

TURNPIKES,

destruction of, 586.

venue, 12.

stat. 13 G. 3. c. 84. s. 42. 586, 7.

V.

VARIANCES,

See *Surplusage*,

when fatal, 254, 5.

omission to prove a particular averment, when fatal, *ib.*

from description of stat. *ib.*

from matter of inducement, 255, 6.

from description of that which is to be proved by a written document, 255, 6, 7.

what variances between two indictments may be reconciled by averment, 325, 6, 7.

in proof of ownership in general fatal, 207.

VENUE,

at common law, 1, 2, 3, 21, &c.

in case of conspiracy, 27, 8.

procurer of misdemeanor, *ib.*

publisher of libel, *ib.*

action of scan. mag. *ib.*

selling coals, &c. under 3 G. 2. c. 26. s. 4. 27, 8.

defendant guilty of nuisance in one county to the damage of another, 26, 7.

where defendant bound to repair of bridge in one county, by reason of tenure of lands in another, *ib.*

in case of usury, *ib.*

jurors, in case of misdemeanors, might inquire of facts in another county, *ib.*

in case of misprision, *ib.*

where statute directs offence to be tried *where committed*, 9.

serving foreign prince, indictment where to be laid, *ib.*

under statutes authorizing a trial in a particular county, 20, 1.

when committed on the high seas, *ib.*

offence must be laid within the true county, *ib.*

offence committed beyond the realm, must be laid according to the fact, 20, 1, 2.

offence, where to be laid in particular cases at common law, 21.

in case of *treason*, *ib.*

where the offence is committed in a second county by means of an innocent agent, 22, 3.

in case of threatening letter sent into second county, 22, 3, 4.

person standing on one county commits murder in a second, *ib.*

procures poison to be delivered, or an house to be burnt in a second, 23.

jurors, when they may inquire at common law of an act done in a foreign county, 23, 4, 5.

when the act is transitory, *ib.*

embezzlement by clerk, where to be laid, 24, 5.

See *County*.

VERDICT,

in a capital case to be returned in the presence of the prisoner, 341.

otherwise in the case of a misdemeanor, *ib.*

formerly, jury once charged and sworn could not be discharged before verdict, *ib.*

but it is now decided that they may, 41, 2, and see *Appendix Note* to p. 341.

different kinds of verdicts, 342.

general verdict upon the whole of the charge, 342, 3.

sufficient if any one count be valid, 342.

but otherwise in civil cases, 343.

guilty as to part, *ib.*

every indictment divisible, *ib.*

and the defendant may be convicted of part, and be acquitted as to the residue, *ib.*

but if the defendant be charged with a contract, it must be proved as laid, *ib.*

defendant charged with the more special, may be convicted of the more general offence, though both may be offences by stat. 343, 4.

Appendix Note to p. 344.

may be convicted of larciny though charged with burglary, 344, 5.

or with stealing from the person, 344.

of manslaughter, though charged with murder, *ib.*

of murder, though charged with petit treason, *ib.*

of petit larciny, though charged with grand larciny, *ib.*

upon a charge of murder the jury ought to find a verdict of manslaughter if the facts warrant it, *ib.* and see p. 39. 40, 1, 2, 3.

this rule not allowed to operate to the disadvantage of the defendant, 345.

limitation of this rule, 42, 3, 345.

charge of felony cannot be modified into a misdemeanor, *ib.*

two indictments, one for felony the other for a misdemeanor, ought not to be preferred at the same time, 42, 3.

upon an indictment for felony he cannot be convicted of a trespass, 42, 3, 345.

nor receive judgment for a trespass, 346.

upon an indictment for murder the defendant cannot be found guilty of petit treason, *ib.* and 41, 2.

but upon an indictment for petit treason he may be found guilty of murder, 41, 2, 346.

- general qualities and requisites of a verdict in case of a partial acquittal, 346.
 the verdict should embrace the whole charge, *ib.*
 when the facts are specially found, the verdict will be sufficient, though the defendant be guilty of part only of the offence charged, 347.
 form of the verdict in case of a partial acquittal, 348.
 in case of burglary, 349.
 proper form of entering the verdict in such case, 349, 50.
 against one of several, 350.
 may be found guilty of offences differing in degree, *ib.*
 exception, *ib.*
 riot, *ib.*
 conspiracies, *ib.*
 accessories, 350, 1.
 burglary, 351,
 special finding of facts, *ib.*
 province of jury confined to facts, *ib.*
 in matters of law to follow the direction of the court, *ib.*
 course pursued where the criminality of the act depends upon facts which are not apparent on the record, *ib.*
 special case reserved, 351, 2.
 special verdict, 352.
 may be given in criminal as well as in civil cases, *ib.*
 in some instances a special verdict must be given, *ib.*
 reason for this, *ib.*
 in what cases of homicide a general verdict of acquittal may be given, 353.
 matters essential to a special verdict, *ib.*
 should find facts, *ib.*
 may find transitory facts though proved to have been done in a foreign county, *ib.*
 but cannot find that which is essential to the offence to have happened in a foreign county, *ib.*
 what variances between the indictment and verdict will be fatal, 353.
 sufficient though precise and technical words be not used, *ib.*
 in case of insufficient verdict, a new *venire facias* may be awarded, 354.
 special verdict, whether amendable, *ib.*
 material facts must be found in the county in which the indictment is laid, *ib.*
 courts are confined to the facts found, *ib.*
 and defects cannot be supplied by intendment, 354, 5, 6.
 former practice in case of libel, 354, 5.
 altered by stat. 32 G. 3. c. 60. 356.
 a conclusion against law may be rejected, *ib.*
 in case of murder unnecessary to find malice, *ib.*

against a principal in the second degree,
 See *Appendix Note* to p. 357.
 jury may be required to reconsider their verdict, 357.
 may rectify it before it is recorded, *ib.*
 after it has been recorded, cannot be altered in matter of
 substance, *ib.*
 but may in matter of form, *ib.*
 where facts are defectively found, *venire facias de novo*
 grantable, *ib.*
 may be amended if entered contrary to the minutes taken at
 the trial, *ib.*
 when necessary to find facts *dehors* the record, 358.
 in case of homicide, *ib.*
 in case of robbery, formerly usual to charge the jury, in
 case of acquittal, to inquire who did it, *ib.*
 practice ceased when the jurors came from the body of the
 county, *ib.*
 whether the party fled, *ib.*
 the inquest traversable, *ib.*
 what may be rejected as surplusage, *ib.*

VIDELICET,

See *Surplusage*.

W.

WALES,

offences committed in, where triable, 14.
 stats. 26 H. 8. c. 6. and 34 & 35 H. 8. c. 26, 15, 16.
 construction of these statutes, 15, 16.
 plundering of ships wrecked in Wales, *ib.*
 next English county, what, *ib.*
 when act of parliament shall be construed to extend to, 13,
 14.
 20 G. 2. c. 42. s. 3. *ib.* note (*r*).

WAREHOUSE,

stealing in, 468.

WOOLLEN CLOTH,

stealing of, 475, 6.
 stat. ousting of clergy, *ib.*

WORDS,

of magistrate:
 indictment for, 123.

WRECK,

plundering of, in Wales, 15, 16.
 stealing from, 475, 6.
 stat. 26 G. 2. c. 19. s. 1. 477.

INDEX TO THE PRECEDENTS.

. *The number prefixed denotes the number of the precedent, the number subjoined, the page.*

A.

ABATEMENT, PLEAS IN,

327, of a wrong addition, 784.

330, misnomer, that there is no such parish as that named in the indictment, 786.

ACCESSORY,

119, indictment against an accessory before the fact to a felony, 481.

120, against an accessory for receiving the principal felon, ib.

121, against an accessory for receiving stolen goods, 482.

122, against an accessory for receiving goods in one county, the principal having been convicted in another county, ib.

123, for a misdemeanor in receiving stolen goods, 483.

124, against two for unlawfully receiving stolen lead, under the stat. 29 G. 2. c. 3. s. 1. 484.

125, of felony for receiving money to help a person to stolen goods, and not apprehending the felon, 486.

ARSON,

82, indictment for arson, 439.

83, for burning a cotton mill, 442.

84, for burning the defendant's own house with intent to defraud the insurers, 443.

85, for setting fire to a dock-yard and destroying naval stores, 443.

86, for setting fire to a stack of hay, 444.

87, at common law, for setting fire to a place of confinement in a borough, ib.

ARTIFICER, ENTICING OF, see *Trada*.

ASSAULTS,

- 37, common commencement; commencement of a subsequent count, 406.
- 38, for a common assault, 407.
- 39, for assaulting a constable in the execution of his office, ib.
- 40, for an assault and false imprisonment, ib.
- 41, for the like, and obtaining five guineas for discharging, 408.
- 42, for the like, and obtaining a note for discharging, ib.
- 43, for an assault with intent to ravish, ib.
- 44, against two persons for assaulting a married woman, with an intent that one of them should ravish her, ib.
- 45, for assaulting a woman quick with child, so that the child was brought forth dead, 409.
- 46, for assaulting one of the collectors of a turnpike in the execution of his office, ib.
- 47, for an assault on a boy, with intent to commit sodomy, ib.
- 48, for an assault with an intent to murder, 410.
- 49, for assaulting the driver of a chaise, and with the off-wheel of a cart overturning the chaise, ib.
- 50, for an assault and beating out an eye, 411.
- 51, for the like, and tearing the hair off the prosecutor's head, ib.
- 52, for a assault and encouraging a dog to bite, 412.
- 53, for a assault and rescuing goods distrained for rent, ib.
- 54, for assaulting a game-keeper in the execution of his duty, 413.
- 55, for an assault, by casting a person on the ground and kicking him, 414.
- 56, for an assault and casting into a pond with intent to suffocate, ib.
- 57, for a riot and assault on a surveyor of turnpike roads in the execution of his office, and for preventing the labourers from working, 415.
- 58, against a man and his wife for cruelly beating and ill-treating, parish apprentice, and keeping him from necessary food, 417.
- 59, for entering public-house, making a noise therein, and threatening bodily harm to the owner, 419.
- 60, for an assault and riot in a dwelling-house, and removing goods, ib.
- 61, for an assault on a deputy goaler in the execution of his office, 41.
- 62, for an assault on an excise officer, ib.
- 63, for an assault, false imprisonment, and rescue, 421.

- 64, indictment under the stat. 9 G. 1. c. 22. for shooting at a person in his dwelling-house, 422.
- 65, of felony by slitting a nose, and against the aider and abettor, 24.
- 66, for striking a person with a weapon in a church-yard, 425.
- 67, for an assault with intent to rob, under the stat. 7 G. 2. c. 21. 426.
- 68, for a felonious assault, with intent to spoil clothes, &c. 427.
- 69, for feloniously assaulting a privy counsellor in the execution of his office, 428.
- 70, for challenging to fight on account of money won at play, under the stat. 9 Ann. c. 14. for the same, alleging an assault and beating, 429.
- 71, for an assault under the stat. 36 G. 3. c. 9. 431.
- 72, for an assault, &c. with intent to stop grain, &c. ib.

ATTEMPTS, SOLICITATIONS, and ENDEAVOURS,

- 229, for endeavouring to seduce a soldier from his allegiance, 651.
- 230, for enticing an artificer to leave the kingdom, ib.
- 238, for an attempt to poison, 663.
- 239, for an attempt to burn the defendant's own house, 664.
- 240, for soliciting a servant to steal his master's goods, 666.
- 308, information for persuading a soldier to desert, 749.
- See tit. *Malicious Mischief, Libel*.

AUTERFOITS CONVICT,

- 335, of manslaughter, plea of, to charge of murder, 792.

B.

BANKRUPT,

- 175, indictment against, for a fraudulent concealment of his effects, 568.

BASTARD, see *Homicide, Murder*.

BIGAMY, see *Polygamy*.

BLACK ACT,

- See tit. *Malicious Mischief, Subornation, Perjury*.
- 176, under the Black Act, for breaking down the mound and head of a fish-pond, whereby the fish were lost, 576.
- 177, for maliciously cutting down trees, ib.
- 178, for forcibly rescuing a person from a constable, charged with feloniously sending a letter, without a name subscribed, demanding money, 578.

- 179, for feloniously and maliciously killing a gelding 579.
- 180, for maliciously wounding a cow, *ib.*
- 181, for maiming a gelding, *ib.*
- 182, for cutting with intent to resist the lawful apprehension of the defendant for an offence, 580.

BURGLARY,

- 79, indictment for burglary, 436.
- 80, for burglary, alleging a breaking in with intent, an actual felony committed, and a breaking out against the statute 12 Ann. c. 7. 438.

BURNING, see *Arson*.

C.

CERTIFICATE,

- 348, of the former conviction, 813.

CHALLENGE,

- 70, indictment for challenging to fight on account of money won at play, 429.

CHEATS,

- 126, for cheating, at common law, by means of false cards, 488.
- 127, for selling cloth with the alneager's seal counterfeited thereon, 491.
- 128, at common law, for uttering a counterfeit half-guinea, *ib.*
- 129, for selling by false scales, 492.
- 130, for deception in the sale of wine by bartering and false pretending, 493.

See *False Pretences, False Tokens*.

CHURCH, see *Larciny, Riot*.

CHURCH-YARD, see *Assault*.

CLERGY, see *Counter-plea*.

CLERK,

embezzlement by, see *Larciny*.

CLOATHS, SPOILING OF, see *Assaults*.

COIN,

- 168, for coining copper money, 555.
- 169, for putting off false copper money at a lower rate than its denomination imports, 556.
- 170, for putting off counterfeit silver money, 556.
- 171, for putting off counterfeit silver, having at the same time counterfeit silver in possession, 557.

172, for uttering a counterfeit shilling, having before been convicted as a common utterer of counterfeit money, 560.

173, for counterfeiting bank tokens, 563.

174, for buying guineas, 566,

See *Treason*.

COMMON COMMENCEMENTS, &c.

1, commencement of an indictment taken at the assizes or general quarter sessions, 375.

2, the same with an alias dictus, ib.

3, the same, with an alias dictus of the christian name, 376.

4, the same with an alias dictus of degree, ib.

5, the same against a married woman, ib.

6, conclusion to every count, ib.

7, commencement of a count subsequent to the first, ib.

8, commencement of an inquisition taken before the coroner, 377.

9, commencement of an information by the attorney-general, ib.

COMPOUNDING PENALTIES,

320, indictment for unlawfully compounding a penalty contrary to the statute, 770.

CONSPIRACY,

280, for a conspiracy, riot, and burning of a prison, 707.

281, to defraud the prosecutor of his money by fraudulent wagers, 709.

282, against parish officers, for conspiring to persuade a poor couple to marry, in order to burthen the man's parish with the maintenance of the woman, 711.

283, for conspiring to charge the hundred by means of a pretended robbery, 714.

284, for conspiring to charge a man with a rape, 716.

285, for conspiring to charge a man with receiving stolen goods, 718.

286, to charge a man with an unnatural crime, 719.

287, for a conspiracy amongst workmen to raise their wages, and lessen the time of labour, 720.

288, for a conspiracy and defrauding a person of 50*l.* under the pretence of procuring an office for his son, 772.

289, for conspiracy to charge a man as the father of a bastard, 724.

305, against workmen for a conspiracy to raise their wages, 742.

306, for conspiring to charge a parish with the maintenance of an infant child, 743.

See tit. *Oaths*.

CONSTABLE, see *Office*.

CONTEMPT, see *Office*.

CORONER, see *Office*, *Extortion*.

CRUELTY,

58, to an apprentice, 417.

302, ill treatment of a servant, 740.

COUNTERPLEA,

347, to oust of clergy, that the benefit of the statute has already been allowed, 810.

348, certificate of the former conviction, 813.

COVENTRY ACT,

65, indictment under, 424.

D.

DEER, see *Larciny*.

DEMURRER,

331, special demurrer, 786.

332, general demurrer, *ib*.

346, joinder in demurrer, 810.

DESTROYING GAME, &c. at night.

301, indictment for, under statute, 739.

DWELLING-HOUSE, see *Arson*, *House*, *Larciny*.

E.

EMBEZZLEMENT, see *Larciny*.

ENGROSSING,

254, indictment for, 681.

300, the like, 737.

ESCAPE, see *Rescue*.

215, against a gaoler for wilfully permitting one under sentence of transportation for felony to escape, 627.

216, against a private person for breaking gaol, and assisting a felon to escape who was under sentence of transportation, 629.

217, at common law, against a constable for negligently permitting a man to escape, who had been committed for a rape, 630.

218, at common law, against a constable, for negligently permitting a man to escape, who was arrested by him for a misdemeanor, 632.

- 219, against the turnkey of a common gaol for a misdemeanor in aiding a prisoner, committed by virtue of a justice's warrant for petit larciny, to make his escape, *ib.*
- 220, against a prisoner confined in gaol for debt, (by virtue of a writ issued out of the Common Pleas and the sheriff's warrant to the gaoler,) for attempting to break the gaol in order to make his escape, 634.
- 221, against a constable for wilfully permitting a prostitute to escape, 636.
- 222, for assisting a prisoner, charged with a forfeiture to the king, to escape out of prison, 637.
- 223, for conveying files into a prison, in order to facilitate the escape of a prisoner, 639.

EXTORTION,

- 201, indictment against two collectors of taxes, for extorting money under colour of their office, 610.
- 202, against a constable, for extorting money of a person apprehended by him on a bench warrant, to let her go without carrying her before any justice of the peace, 611.
- 203, against a tipstaff of the Court of K. B. for extortion, 612.
- 204, against a servant of a clerk of a market for extortion, *ib.*
- 205, against a coroner for extortion, 613.
- 206, against a headborough for extortion, 614.
- 207, against a gaoler for extortion in office, *ib.*
- 208, order of sessions for the discharge of a clerk of the peace for extortion, 616.
- 311, indictment against a bailiff for extortion, in levying a writ of fieri facias, 752.

F.**FALSE PRETENCES,**

- 132, for obtaining money by drawing a bill, and falsely pretending that W. H. was indebted to the defendant, and would pay the bill, 496.
- 133, under false pretences of being merchants of good fortune, 498.
- 134, for obtaining goods from a tradesman under pretence of being a servant to one of his customers, 499.
- 135, against an apprentice for a fraudulent enlistment, *ib.*

312, for obtaining money by falsely pretending that a letter had been overcharged, 752.

313, for obtaining money by falsely pretending that the prisoner was the person mentioned in an order for money sent by the post, 754,

314, for obtaining money by falsely pretending that his name was Reeves, of the Alien Office, &c. 756.

FALSE TOKENS,

131, for defrauding a person of a sum of money by colour of a false and counterfeit letter, and other falsetokens, upon the stat. 33 H. 8. c. 1, 494.

FISH, see *Larciny*.

FISH-POND, see *Black Act*.

FORCIBLE ENTRY, &c.

88, for a forcible entry and detainer, at common law, 444.

89, for a forcible entry into a freehold, 445.

90, for a forcible entry on tenant for years, under the stat. 21 J. 1. c. 15. 447.

FORESTALLING, see *Trade and Provision*.

FORGERY,

138, for forging an indenture of bargain and sale and a release of another's freehold estate in right of his wife, upon stat. 5 Eliz. c. 14. 506.

139, for forging a Bank of England note, and uttering the same, 511.

140, for having in possession forged Bank of England notes without lawful excuse, knowing the same to be forged, 517.

141, for forging, &c. a bill of exchange, an acceptance thereof, and an indorsement thereon, 518.

142, for forging and publishing a receipt for payment of money, 520.

143, for feloniously altering a bank note, *ib*.

144, for forging a bond signed with a mark, and publishing the same, with intent to defraud the executors of the person supposed to have made it, 522.

145, for forging a receipt of the Sun Fire Office Society, 523.

146, for altering an accountable receipt given by one of the clerks of the Bank of England, 525.

147, for forging a will, 527.

149, at common law, for forging a writ of *fieri facias*, and thereby taking a person's goods in execution, 532.

G.

GAMEKEEPER, see *Assault*.

GAMING,

136, for fraudulently winning money at dice, 500.

137, for winning above ten pounds at cards at one time and sitting, 501.

See *Challenge*.

GAOL, see *Escape, Rescue, &c.*

H.

HIGHWAY,

269, against a parish for not repairing an highway, 692.

270, presentment by a justice for not repairing an highway, 694.

271, against an individual for not repairing an highway, to the repair of which he was bound *ratione tenure*, 695.

272, against a particular division of a parish, for not repairing an highway, 696.

273, against a township, for not repairing an highway set out by commissioners under an inclosure act, 698.

323, record of the presentment of a highway by a justice of the peace on view, 779.

324, indictment against a parish with the exception of one township exempted specially by act of parliament for not repairing a highway, 782.

See tit. *Nuisance, Pleas, &c.*

HOMICIDE, see *Manslaughter, Murder*.

HORSE, STEALING OF, see *Larciny*.

HOUSE, see *Arson*.

81, breaking of in the day-time, no person being therein, &c. 438.

187, for breaking into houses and shops, &c. with intent to destroy linen goods, woollen goods, frame-work, 587.

I.

IMPRISONMENT, see *Assault*.

INFORMATION,

9, form of, 377.

See *Magistrate*.

INTENT, see *Assaults*.

J.

JUSTICE, OBSTRUCTION OF,

- 125, for receiving money to help to stolen goods, without apprehending the felon, 486.
- 275, against a township for burying a body without notice to the coroner, 702.
- 276, for rescuing a rioter, 703.
- 277, for maintenance, 704.
- 278, for compounding felony, 705.
- 279, for being a common barretor, 706.

L.

LARCINY,

- 92, for grand larciny, in stealing the property of different persons, 448.
- 93, for stealing goods, money, and notes, 451.
- 94, under the stat. 21 H. 8. c. 2. against a servant for feloniously embezzling his master's goods, delivered to him to keep for the master's use, 452.
- 95, against a clerk for embezzlement, under the stat. 39 G. 3. c. 85. 453.
- 96, for stealing goods let by contract to be used with a lodging, 456.
- 97, for stealing a letter, containing bills of exchange, out of a bag sent by the post, 457.
- 98, for a mail robbery, 459.
- 99, under the stat. 5 G. 3. c. 14. s. 6. for stealing conies from grounds used for the breeding and keeping of conies, 461.
- 100, for stealing a gelding, under the stat. 2 & 3 E. 6. c. 33. 462.
- 101, for stealing fish out of a park or paddock, under stat. 5 G. 3. c. 14. ib.
- 102, for felony under the stat. 9 G. 1. c. 22. for appearing armed and disguised, and stealing deer in an enclosed park, 463.
- 103, for killing a sheep, with an intent to steal part of the carcase under the stat. 14 G. 2. c. 6. s. 1. 465.
- 104, for stealing shrubs from a garden, 466.
- 105, for stealing above the value of 40 shillings in a dwelling-house, 467.
- 106, of felony for stealing above five shillings in a shop, 468.
- 107, for stealing in a dwelling-house to the amount of five shillings, putting the owner in fear, under the stat. 3 & 4 W. & M. c. 9. s. 1. 469.

- 108, for stealing plate out of the chapel belonging to a college, against the principal and the accessories before the fact, 470.
- 109, of felony for sacrilege in stealing goods out of a church, 472.
- 110, for stealing from the person, 473.
- 111, for robbery from the person, 473.
- 112, for stealing linen from a bleaching-croft, 474.
- 113, for stealing woollen cloth from the tenters, 475.
- 114, for stealing from a ship wrecked, 476.
- 115, for stealing to the value of 40 shillings in a ship on a navigable river, 477.
- 116, for stealing lead fixed to a dwelling-house, *ib.*
- 117, against the receiver, 479.
- 118, against several persons, for piratically taking and carrying away a ship, with its tackle, &c. and certain goods on board the same, 480.
- 293, for stealing goods belonging to overseers of the poor, 729.

LEAD, see *Larciny, Receivers, Accessories.*

LETTER, see *Threatening Letter, Larciny.*

LIBEL, &c.

- 231, indictment for uttering seditious words, 652.
- 232, for writing and publishing a libel against the king and his government, 653.
- 233, for writing and delivering a challenge, 656.
- 234, for challenging and posting, 657.
- 235, for libelling by drawing in effigy, 658.
- 236, for a libel on a private person, 662.
- 237, for publishing an obscene print, 663.

LINEN, see *Larciny*, 112.

LODGING, see *Larciny.*

M.

MAGISTRATE, see *Office.*

- 190, information against a magistrate for discharging a person out of custody, who had been committed for seducing manufacturers into foreign service, 593.
- 191, against a magistrate for maliciously and corruptly refusing to license a public-house, 595.
- 192, information against a justice of the peace, for causing a person to be imprisoned for want of bail in a matter not cognizable before him, and ordering him to be kept in close confinement, without pen, ink, or paper, or the sight of any friend, 598.
- 193, information against a justice of the peace, for causing a young woman to be publicly whipt as a disorderly

person, without any view, information, or proof, exhibited against her, 600.

MAIL,

98, robbery of, 459.

MAINTENANCE, see *Justice, Obstruction of.*

MALICIOUS MISCHIEF, see *Arson, Black Act, Burning, Turnpike.*

176, for breaking down the head and mound of a fish pond, 576.

177, maliciously cutting down trees, *ib.*

179, maliciously killing a gelding, 579.

180, maliciously wounding a cow, *ib.*

181, for maiming a gelding, *ib.*

182, for cutting with intent to resist a lawful apprehension, 580.

183, for maliciously shooting at and cutting, 583.

184, for administering drugs to a woman quick with child, with intent to procure abortion, 585.

185, the same, the woman not being quick with child, 586.

MANSLAUGHTER AND MURDER,

17, commencement of an indictment for murder or manslaughter, 385.

18, conclusion of an indictment for manslaughter, 387.

19, against one for the murder of her father, by intermixing arsenic with tea and water-gruel of which he drank at different times, *ib.*

20, for murder, by striking with a bucket, tried in the court of admiralty, 389.

21, for murder and petit treason by shooting, viz. against the person who shot, and the widow of the deceased for aiding and assisting, 391.

22, for murder, by placing poison so as to be mistaken by the person poisoned for medicine, 392.

23, against a man for confining and starving his wife to death, 394.

24, against a woman for drowning her own child in a pond, 395.

25, for murder, as well by striking with a stick as by choaking, squeezing, and pressing, &c. 396.

26, for murder, by beating with fists and kicking on the ground, 397.

27, against a defendant who is accessory in one county to a murder committed in another, 398.

28, against a servant for petit treason and murder, 400.

29, against one for shooting the deceased, and against another as aiding and abetting, 401.

30, for strangling with a handkerchief, *ib.*

- 31, for murder, where the death was occasioned by wilfully riding over a person with a horse, 402.
- 32, by casting a stone, *ib.*
- 33, for felony and murder by stabbing with a knife, 403.
- 34, against the driver of a cart for manslaughter, *ib.*
- 35, indictment under the statute 1 J. 1. c. 3. s. 2. for felony by stabbing, 404.
- 36, for the murder of a bastard child, 405.

N.

NOSE, SLITTING OF, see *Corentry Act*.

NOT GUILTY, PLEA OF, see *Pleas*.

NUISANCE,

- 257, for erecting and continuing a soap manufactory near a highway, &c. 684.
 - 258, for keeping hogs near a public street, 686.
 - 259, for erecting a furnace with a boiler, for the boiling of offal, &c. *ib.*
 - 260, for boiling blood, &c. for mixing colours, 687.
 - 261, for using a shop as a slaughter-house, in a public market, *ib.*
 - 262, for erecting obstructions on a navigable river, 688.
 - 263, for keeping a disorderly house, 689.
 - 264, for digging holes in the king's highway, 690.
 - 265, for laying soil in the streets, *ib.*
 - 266, for obstructing a public street, *ib.*
 - 267, for obstructing a common passage, *ib.*
 - 268, for keeping open shop on the sabbath day, 692.
 - 297, for erecting a furnace, 735.
 - 298, for keeping a disorderly house, 736.
 - 303, for carrying a child infected with the small-pox along a public highway.
 - 310, against a tithing-man for permitting persons to light fireworks, &c. 750.
 - 321, for keeping a ferocious mastiff unmuzzled, 773.
 - 322, on stat. 6 G. 1. c. 18. commonly called the Bubble Act, 773.
- See *Highway*.

O.

OATHS, UNLAWFUL,

- 290, for administering an unlawful oath, 727.
- 291, for taking an unlawful oath, 728.

292, against one for administering, and another for aiding at the administering of an unlawful oath, *ib.*

OFFICE, MISCONDUCT IN, see *Contempt, Refusal.*

194, for refusing to watch with the constable when duly summoned, 602.

195, for a contempt by the headborough in refusing to convey a person to prison upon a commitment by a justice of the peace, *ib.*

196, for a contempt by a high constable in disobeying an order of sessions, 603.

197, against a constable for not appointing any watch, and absenting himself from watching, 604.

198, against a constable for refusing to assist another in securing a person in custody for a breach of the peace, in contempt of a justice's order, 605.

199, against a constable for neglecting to return his presentments at the assizes, 606.

200, against an overseer of the poor for refusing to pay to a pauper a weekly sum of money, contrary to an order of two justices, 607.

209, against a coroner for refusing to take an inquisition, 618.

210, for refusing to take the office of overseer after a due election, 619.

211, against a person for refusing to take the office of chief constable, *ib.*

212, against a person for refusing to take the oath of constable of a manor, to which office he had been duly elected at a court leet, 620.

213, against a person for refusing to take the oath of constable of the ward of Farringdon Within, after being elected at a court of wardmote, 622.

214, against a headborough for not taking the office after due election, 625.

322, indictment for disobeying an order of sessions, 777.

OVERSEER, see *Office.*

307, indictment against, for procuring the marriage of paupers in order to charge a parish, 747.

P.

PERJURY,

150, for perjury at Chester assizes, in giving evidence on the trial of a felon, 533.

- 151, for perjury committed on the execution of a writ of inquiry, 538.
- 152, for perjury committed at the quarter sessions, upon the trial of an indictment for an assault, 539.
- 153, for perjury by a woman before two justices, on the filiation of a child, 540.
- 154, for perjury in an answer before one of the barons of the exchequer, 541.
- 155, against a witness for perjury on a trial in C. B. in an action of trespass and assault, 543.
- 156, for perjury in giving evidence upon the trial of an information at nisi prius, *ib.*
- 157, for perjury in an affidavit for debt, before a commissioner in the country, 544.
- 158, for perjury at the trial of an issue at bar, directed out of the Court of Chancery, touching the capability of a person to make a will, 545.
- 159, for perjury on the trial of an issue in an action of assumpsit, at the sittings after term, in K. B. 546.
- 160, for perjury in giving evidence at the assizes upon the trial of a cause, 547.
- 161, for perjury by a justice of the peace, in an affidavit before a judge of the court of K. B. upon shewing cause why a rule should not be made absolute for leave to file a criminal information against him, *ib.*
- 162, for perjury in an answer sworn before a master in chancery, 549.
- 163, for perjury in an affidavit made in the court of K. B. in order to support a motion for a criminal information, 550.
- 164, against a witness for perjury committed on the trial of a felon at the quarter sessions, 551.
- 165, for perjury in a deposition in the ecclesiastical court, in a suit for defamation, 552.
- 166, for taking a false oath in order to obtain administration to a seaman, under stat. 31 Geo. 2. c. 16. s. 24. 553.
- 315, for perjury assigned on an affidavit made before a judge to support costs, 757.
- 316, for falsely swearing that a young lady was of age, thereby obtaining a marriage licence, &c. 760.
- 317, for perjury committed before an arbitrator, 763.
- 318, for perjury in swearing before a surrogate, &c. 767.

PERSONATION,

- 148, for feloniously personating another person, and becoming bail in his name, before a commissioner of the Court of Common Pleas, appointed to take bail in the country, 529.

PERSON, STEALING FROM, see *Larciny*.

PLEAS,

- 325, not guilty in case of treason or felony, 784.
- 326, not guilty to an information, ib.
- 327, plea of a wrong addition, ib.
- 328, of misnomer of defendant's christian name, 785.
- 329, that the defendant has no addition, ib.
- 330, in abatement of a writ of appeal, that there is no such parish as the one named, 786.
- 331, special demurrer to an indictment wanting allegation of time and place, ib.
- 332, demurrer to indictment for non-repair of highway, ib.
- 333, plea of *auterfoits* acquit to an indictment for burglary and demurrer, .
- 334, to the jurisdiction upon a trial for high treason under a special commission, .
- 335, to an appeal of murder, *auterfoits* convict of manslaughter and admission to clergy, 792.
- 336, by the inhabitants of a county for not repairing one half of a public bridge, that certain persons being liable *ratione tenuræ* to repair an ancient timber bridge there, which was washed away by a flood, built half of the present bridge, and are liable to the repairs, .
- 337, by two inhabitants of a parish, that they are not guilty as to part, 798.
- 338, by a parish, that the road in question is a new road, made by act of parliament, &c. 800.
- 339, that the parish consists of townships, each bound by custom to repair its own roads, 803.
- 340, to a presentment that a particular liberty ought to repair, and not parish at large, 805.
- 341, by a township to an indictment for not repairing highway, confession as to part, not guilty as to the rest, 806.
- 342, that particular persons ought to repair particular parts, ib.
- 343, by an individual for not repairing bridge or highway, 808.
- 344, by a county, that an individual is bound to repair a bridge, ib.
- 345, demurrer to a plea to an indictment against a county for not repairing a public bridge, 809.
- 346, joinder in demurrer, 810.
- 357, counterplea to a plea praying the benefit of stat. that it has already been allowed.

POLYGAMY,

- 76, for having two wives at one and the same time, against the stat. 1 J. 1. c. 11. 434.

77, for having two husbands at one and the same time, 435.

POST-OFFICE, see *Larceny*.

PRISON, BREAKING OF, see *Escape, Rescue*.

PROVISIONS, see *Trade*.

R.

RAPE, &c.

73, for ravishing a woman, 431.

74, for carnally knowing and abusing a female child under the age of ten years, *ib.*

75, of felony, for taking a woman having substance, &c. against her will, under the stat. 3 H. 7. c. 2. 432.

RECEIPT, see *Forgery*.

REFUSAL TO TAKE AN OFFICE, see *Office*.

255, indictment for, 680.

REPLICATION,

306, denying the liability *ratione tenuræ*,

307, denying the custom alleged in the plea, that particular townships ought to repair, *ib.*

See *Counterplea*.

RESCUES, &c.

63, for an assault, false imprisonment, and rescue, 421.

178, for a rescue under the black act, 578.

224, against two for a rescue, one of them being in the custody of an officer of the marshal's court, upon process, 642.

225, for rescuing a person taken on a bill of Middlesex, 643.

226, for rescuing goods distrained for rent, 644.

227, against a felon for being at large before the expiration of his term of transportation, 645.

228, against a felon for being at large before the expiration of the term, after a conviction at the quarter sessions, 648.

RIOT,

241, indictment for a riot, 667.

242, for a riot and assault, *ib.*

243, for a riot and attempt to rescue, *ib.*

244, for a riot under the riot act, 668.

245, for a riot committed in open court, 670.

246, for misbehaviour at church, 676.

- 247, for a riot and beginning to pull down a dwelling-house, ib.
- 248, for a riot and assault in a dissenting meeting-house, ib.
- 249, the same against the stat. 1 W. & M. c. 18. s. 18, 677.
- 294, information for a riot in Covent Garden play-house, and preventing the acting of a play, 730.
- 295, indictment for a riot and breaking windows, 734.
- 296, for a riot in a town, and for a nuisance in playing at foot-ball there, 735.
- 309, for disturbing a dissenting congregation, 749.
- RIVER, OBSTRUCTION OF, see *Nuisance*.
- ROBBERY, see *Larciny, Assaults*.

S.

- SEDITION, see *Attempt, Libel*.
- SEDUCING OF SOLDIER, see *Attempt*.
- SENDING THREATENING LETTER, see tit. *Threatening Letter*.
- SERVANT, see *Larciny*.
- SHOOTING, see tit. *Murder, Malicious Mischief, Black Act*.
- SHOP, see *Larciny*.
- SODOMY,
 - 87, indictment for, 435.
- STABBING, see *Murder*.
- STRIKING, see *Assaults*.
- SUBORNATION,
 - 167, for suborning a woman to swear a bastard child to an innocent person, 554.

T.

- THREATENING LETTER,
 - 188, for sending a letter threatening to charge a capital felony, 589.
 - 189, for sending a threatening letter with a fictitious name subscribed thereto, demanding, &c. 590.
- TRADE AND PROVISIONS,
 - 250, for unlawfully putting on board implements used in manufacturing, 678.

- 251, for preparing to go abroad and exercise a trade, 679.
- 252, for forestalling, *ib.*
- 253, regrating, 680.
- 254, engrossing, 681.
- 255, spreading rumours with intent to raise the price of provisions, *ib.*
- 256, supplying unwholesome provisions, 682.
- 304, for exercising a trade without having served an apprenticeship, against the statute, 742.
- 319, information under statute for forestalling, 768.

TRANSPORTATION,

indictments against felons for being at large before the expiration of their terms, see *Rescue*.

TREASON,

- 12, indictment for levying public war against the king, by riotously assembling armed with offensive weapons, 378.
- 13, an indictment of high treason for coining shillings, 382.
- 14, indictment of high treason for having instruments for coining in custody, *ib.*
- 15, indictments for hiding and concealing tools, 383.
- 16, for petit treason against a woman for poisoning her husband, 384.

TREES, DESTROYING OF, see *Malicious Mischief, Black Act*.

TURNPIKE,

- 186, indictment for destroying, 586.

U.

UNLAWFUL OATHS, see *Oaths*.

USURY,

- 299, indictment for, 736.

UTTERING COUNTERFEIT COIN, BANK NOTES, &c. see *Coin, Forgery*.

W.

WILL, see *Forgery*.

WOOLLEN CLOTH, see *Larciny*.

WRECK, STEALING FROM, see *Larciny*.

THE END.

